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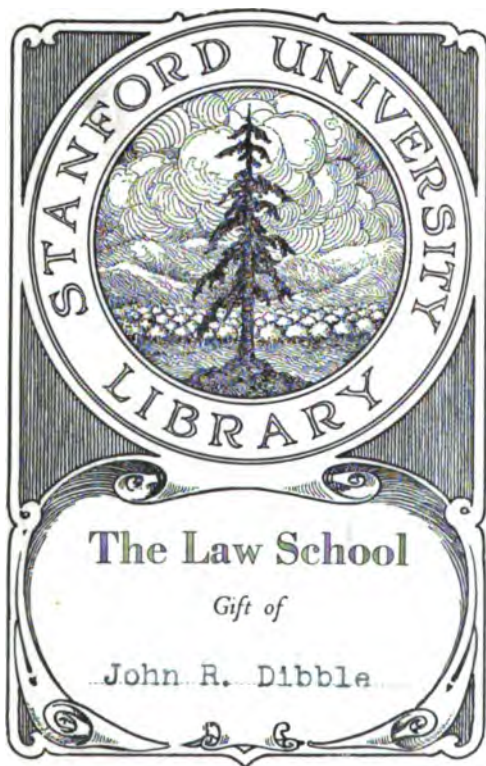
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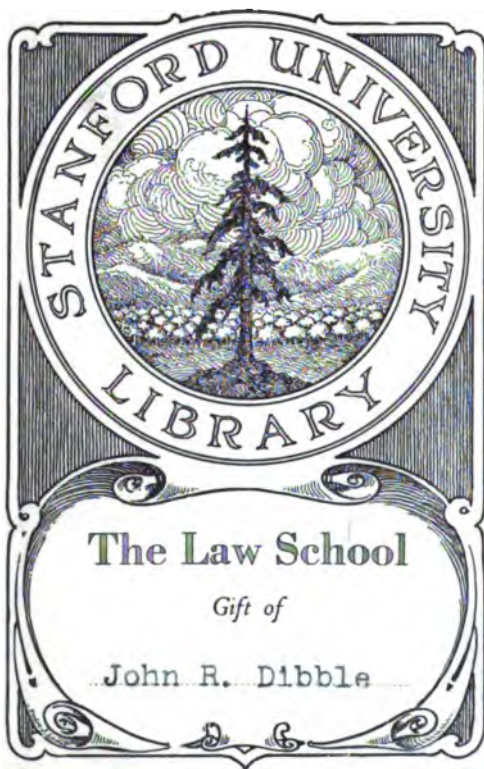
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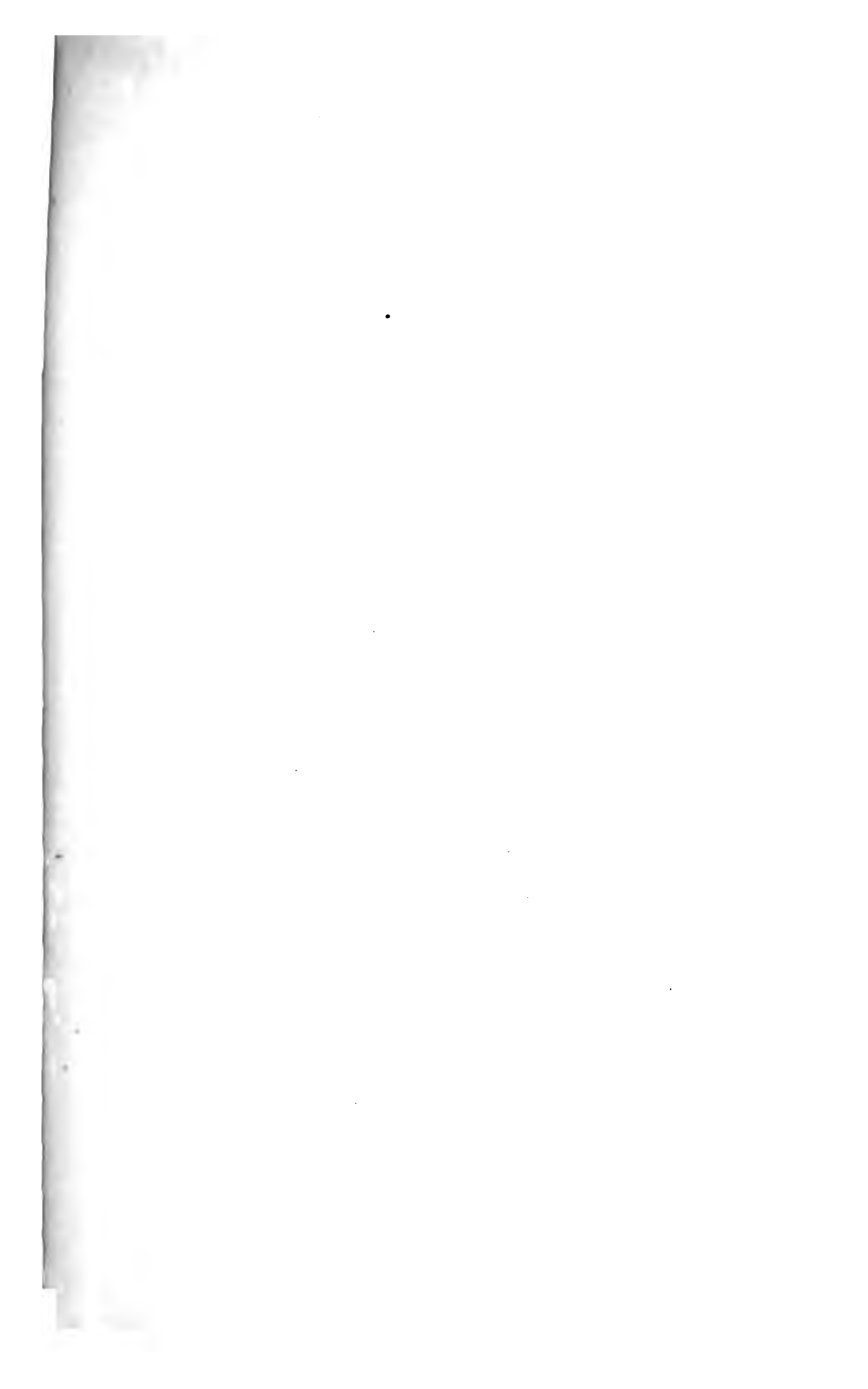
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6

A  
TREATISE  
ON  
P L E A D I N G ,  
WITH  
A COLLECTION  
OF  
Precedents,  
AND  
AN APPENDIX OF FORMS  
ADAPTED TO  
THE RECENT PLEADING AND OTHER RULES,  
AND WITH  
Practical Notes.

*Nihil simul inventum est et perfectum.*—Co. Lit. 230 a.

IN THREE VOLUMES.

VOL. III.

By JOSEPH CHITTY, Esq.

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

**Thirteenth American Edition,**  
FROM THE SIXTH LONDON EDITION, CORRECTED AND ENLARGED.

With the new matter incorporated of the Text of the Treatise in the

SEVENTH LONDON EDITION,

By H. GREENING, Esq.

WITH NOTES AND ADDITIONS, BY JOHN A. DUNLAP AND E. D. INGRAHAM, ESQRS.

AND ADDITIONAL NOTES, AND REFERENCES TO LATER DECISIONS,

BY J. C. PERKINS, Esq.

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For an Appendix of Forms adapted to the recent Pleading and other Rules, lately established in England, see at the close of the present Volume, preceding the Index.

VERMONT 1866

# VOLUME III.

## \*IMPARLANCES.

*In the King's Bench.*

— (a) *Term, 1 William 4.*

GENERAL  
IMPARLAN  
CES.

C. D. }  
ats. } And now at this day, that is to say, on — next after —  
A. B. } in this same Term, until which day the said defendant had leave  
to imparl to the said bill, and then answer the same, before our said lord  
the king at Westminster, come as well the said plaintiff by his attorney  
aforesaid, as the said defendant by E. F. his attorney, and the said de-  
fendant defends the wrong and injury, when, &c. and says, that the said  
plaintiff ought not *further* (b) to have or maintain his aforesaid action  
thereof against him, because he says, &c.—[*state the subject-matter of  
defense.*]

Common  
Imparl-  
ance by  
bill (b).

*In the King's Bench, (or C. P.)*

— (c) *Term, 1 William 4.*

C. D. }  
ats. } And the said defendant by E. F. his attorney, comes and de-  
A. B. } fends the wrong and injury, when, &c. and prays a day thereup-  
on to imparl to the said declaration of the said plaintiff, and it is granted  
to him, &c. And upon this a day is given to the parties aforesaid, before  
our lord the king, until — (e) wheresoever, &c. that is to say, for the  
said defendant to imparl to the declaration aforesaid, and then to answer  
the same; at which day, before our said lord the king at Westminster,  
come the parties aforesaid, by their attorneys aforesaid, and the said de-  
fendant says, &c. [*to the end of the plea.*]

The like by  
original(d).

*In the King's Bench,*

— *Term, 1 William 4.*

[\*890]

C. D. & E. F. }  
ats. } And the C. D. & E. F. by G. H. their attor-  
A. B. } ney come and defend the wrong and injury, when, &c.

General  
imparlance  
and sug-  
gestion.

(a) The term after that of which the declar-  
ation is intituled.

(b) See forms of general imparlance, 4 Lil.  
Ent. 106, 123, 137, 186, 215.—Plead. A. 319.—  
Tidd's Forms, 6th edit. 279. Where the mat-  
ter of defense has arisen after the declaration, it  
may be proper to commence the plea with this

imparlance. 4 East, 502.—6 East, 413.—3  
Lev. 120.

(c) The term after that of which the declar-  
ation is intituled.

(d) See form, Tidd's Forms, 6th edit. 280

(e) A general return day.

GENERAL  
IMPARLAN-  
CES.

of the  
death of  
one of the  
defendants,  
between de-  
claration  
and plea  
(f).

and pray leave to imparl to the declaration, until — next after — (or by original, “until — wheresoever, &c.”) and it is granted to them, &c.; the same day is given to the said plaintiff at the same place, at which day before our lord the king at Westminster, come as well the said plaintiff by his attorney aforesaid, as the said C. D. by his attorney aforesaid, and the said E. F. cometh not. And hereupon the said C. D. gives the court here to understand and be informed, that after the last continuance of the plea aforesaid, and before this day, to wit, on — (*day of death, or about it,*) at, &c. (*venue*) aforesaid, the said E. F. died, and the said C. D. survived him, which allegation the said plaintiff doth not deny, but admits the same to be true, therefore let all further proceedings in this cause against the said E. F. be stayed. And the said C. D. saith. — [*Here state the subject-matter of the surviving defendant.*]

*In the King's Bench.*

— (g) Term, 1 William 4.

SPECIAL IM-  
PARLANCES.  
Special im-  
parlance  
by bill (h).

C. D. }  
ats. }

And the defendant (or if *misnomer* be pleaded, say “and C. D. who is sued by the name of E. D.”) in his proper person, comes, and saving to himself all advantages and exceptions to the said bill, prays leave to imparl thereto, and it is granted to him, &c. And thereupon a day is thereof given to the parties aforesaid before our lord the king at Westminster, until — next after — to wit, to the said defendant to imparl to the bill aforesaid, and then to answer the same; at which day, before our said lord the king at Westminster, come as well the said plaintiff by E. F. his attorney, as the said defendant in his proper person, (or “by — his attorney,”) and the said defendant says, &c.— [*State the subject-matter of the defense.*]

[ \*891 ]

*In the King's Bench.*

— (i) Term, 1 William 4.

The like in  
another  
form.

C. D. }  
ats. }

And now at this day, that is to say, on — next — after — (k) in this same Term, until which day the said defendant saving and reserving to himself all and all manner of exceptions to the said bill of the said plaintiff, had leave to imparl to the said bill, and then to answer the same, before our said lord the king at Westminster, come as well the said plaintiff by — her attorney, as the said defendant by — his attorney, and said defendant defends the wrong and injury, when, &c. and prays judgment of the said bill, because he says, &c.— [*State the subject-matter of defense.*]

(f) See form, Tidd's Forms, 6th edit. 286.

(g) The term subsequent to declaration. In some cases it is necessary to state the special imparlance on the plea when it is delivered entitled of a Term subsequent to the declaration. 2 Saund. 2, n. 2.

(h) See other forms, Lib. Plac. 5, pl. 15.— 1 Lil. Ent. 128, and the law, 2 Saund. 2, n. 2. As to imparlance in general, see ante, vol. i. 875, 9.—Tidd, 9th edit. 462. A plea to the ju-

risdiction as a plea of privilege, or the like, cannot be pleaded after a special imparlance. The defendant must obtain and plead it, if at all, after a general special imparlance, as post, 891. 6 Bing. 816.—4 T. R. 520.—1 Lutw. 6.—1 Wils. 251.—1 Bl. Rep. 51.

(i) Ante. 890, n. g. As to imparlances in general, see ante, vol. i. 875, 6.

(k) The first day of the Term.



*In the King's Bench, (or C. P.)*

— (1) *Term, 1 William 4.*

SPECIAL IM-  
PARLANCE.

C. D. }  
ats. } And the said defendant (or if *misnomer be pleaded, say, "and* Special im-  
A. B. } *C. D. who is sued by the name of E. D."*) in his proper person, *comes, and saving to himself all advantages and exceptions, as well to* imparlance  
*the writ as to the declaration aforesaid,* prays leave to imparl thereunto, *here, until, &c. and it is granted to him, &c. the same day is given to the* by original  
*said plaintiff here, &c. at which day comes here as well the said plaintiff* (m).  
*by — his attorney, as the said defendant in his proper person (or "by*  
*— his attorney,"*) and the said defendant says, &c.

A general special imparlance differs only from the three preceding forms, in this, that instead of the words in italics the following are to be inserted, "*and saving all the advantages and exceptions whatsoever.*" GENERAL  
SPECIAL IM-  
PARLANCE.  
(n).

## \*DEFENSES.

[ \*892 ]

*In the King's Bench, (or "C. P." or "Exchequer.")*

— *Term, 1 William 4.*

C. D. }  
ats. } And the said defendant by — his attorney, comes and de- Defense on  
A. B. } fends the wrong (or in *trespass or ejectment, "force"*) and inju- appear-  
ry, when, &c. (o) and say that, &c.—[*Here state the subject-matter, of* ance by at-  
*the plea.*] torney.

C. D. and wife, }  
ats. } And the said C. D. and E. F. his wife, by G. H. The like by  
A. B. } their attorney, (p), come and defend the wrong and husband  
injury, when, &c. and say, that, &c. and wife.

C. D. }  
ats. } And the said defendant in person (q) comes and defends the The like on  
A. B. } wrong and injury, when, &c. and says, that, &c. appearance  
by a *feme*  
*covert.*

(1) As to the term, see ante, 890, n. g.

(m) See the form, Berne, 10, and the law, 2 Saund. 2, n. 2. As to imparlances in general, see ante, vol. i. 375, 6.

(n) As to when this imparlance is necessary see 2 Saund. n. 2. c.—Ante, vol. i. 375, 6. It is necessary in order to plead to the jurisdiction, as a plea of privilege, &c. 6 Bing. 618.

(o) As to the definition and statement of defenses in general, see ante, vol. i. 367 to 369. The "&c." will imply half defense, in cases where such defense should be made, or full defense where the latter is necessary; therefore the distinctions between half and full defense are now obsolete. 8 T R. 638.—

Willes, 40.—2 Saund. 209, c. According to the old books half defense was as follows:

"And the said C. D. by — his attorney, (or "in his own proper person,") comes and defends the wrong and injury, and says, &c." (omitting the words "when, &c.") and full defense was as follows: "And the said C. D. by — his attorney, comes and defends the wrong and injury, when and where it shall behove him, and the damages, and all which he ought to defend, because he says, &c." 2 Saund. 209, c.

(p) 2 Saund. 218.

(q) Must not be by attorney, 2 Saund. 209 c.

Defense by a person sued by a wrong name. } And C. D. (r) against whom the  
C. D. sued by the name of E. D. } said plaintiff hath exhibited his said  
ats. }  
A. B. } bill, by the name of E. D. in person, (or, "by — his attorney,) comes  
[\*893] and defends the wrong and injury, when, &c. and says, &c.

Defense by C. D. } And the said defendant by G. H. admitted by the said court  
an infant ats. } here, as guardian of the said defendant to defend for the said de-  
(s). A. B. } fendant, who is an infant under the age of twenty-one years, comes and  
defends the wrong and injury, when, &c. and says, &c.

[ \*894 ]                      \*PLEAS TO THE JURISDICTION.

Pleas to the jurisdiction of an inferior court (t).      In the court of ———  
C. D.      And the s

C. D. }  
ats. } And the said defendant, in his own proper person comes (u)  
A. B. } and says, that this court ought not to have or take further cognizance of the action aforesaid, because he says, that the said supposed cause of action, and each and every of them, (if any such have accrued to the said plaintiff, accrued) to the said plaintiff out of the jurisdiction of this court, that is to say, at — in the county of — (w) and not at — in the county of — or elsewhere within the jurisdiction of this court; and this the said defendant is ready to verify, wherefore he prays judgment whether this court can or will take further cognizance of the action aforesaid. [There must be an affidavit of the truth, which may be framed as post, 897.]

(r) Whenever the defendant pleads in a different name to that in which he is sued, whether in abatement, (5 T. R. 487.) or in bar, (8 Wils. 413.—8 Wentw. 210.) the plea must begin as above, and not with the words, "And the said C. D." or "he against whom, &c." because it is said, by introducing the word "*said*" he would admit himself to be the person sued. Willes, 41, note c.—2 Saund. 209. b.—5 Taunt. 652. 8.

(c) See form, Morg. 221.—A person who is an infant at the time of pleading, must plead by *guardian*. 2 Saund. 117 g. note 1. 212 a. note 4. If a minor defendant appears by attorney, the court will, at the plaintiff's instance, compel an amendment of the appearance, by substituting a guardian. 7 Taunt. 488. 1 J. B. Moore, 251, 8 C. Infant defendant, on a judgment by default, may bring error if he appear by attorney, but the

plaintiff cannot bring error on a judgment given for infants, see 5 B. & Ald. 418, and see further as to defenses and appearances by infants, ante, vol. i. 868, 899, and Index, "*Infant*."

(†) See precedents of pleas and replications, 1 Wentw. 51, 60, 61, 69, 78.—Lil. Ent. 475.—1 Wentw. Index.—1 Mall. 2. As to the points relating to these pleas, see ante, vol. i. 880 to 386.—Eac. Ab. tit. Courts, D. 4.

(u) "Defends the wrong and injury," not necessary, Bac. Ab. tit. Pleas, D.—Carth. 220.—Salk. 217. "When, &c." is improper, see ante, vol. i. 482.

(w) This is not necessary in a plea to the jurisdiction of an inferior court; it is sufficient to allege that the cause of action accrued out of its jurisdiction, without showing the jurisdiction to which the plaintiff should have resorted, 6 East, 600, 601.

## \*PLEAS IN ABATEMENT (x)

*In the King's Bench.*

— Term, 1 William 4. PRIVILEGE.

C. D. gent. one, &c. }  
                                  ats.

A. B. } And the said defendant in his own proper per- Plea of  
                                  son comes and defends the wrong and injury, privilege  
when, &c. and says, that before and at \*the time (z) of the exhibiting by an at-  
the said bill of the said plaintiff, he the said defendant was, and from torney of  
thence hitherto hath been and still is, one of the attornies of the court of C. P. to an  
our lord the king of the Bench at Westminster in the county of Middlesex; action in  
and that the said defendant during all the time aforesaid, hath prosecuted K. B. de-  
and defended, and still doth prosecute and defend, divers suits and pleas fendant  
in the same court of the Bench, for divers liege subjects of our said lord being sued  
the king, as their attorney (a); and the said defendant further saith, that as a com-  
he and all other the attornies of the said court of the Bench, prosecuting mon per-  
and defending suits and pleas for their clients, in the said court of the son (y).  
Bench, ought (b), by an ancient and laudable custom, from time immemo- [ \*896 ]  
rial used and approved of, according to the laws and customs of this realm,  
and the liberties and privileges of the said court of the Bench, to be free

(z) As to place in abatement in general, vol. i. 886 to 402. See precedents, 2 Rich. C. P. 9.—Lil. Ent. 3, 9, and a plea by a sergeant, Plead. A. 356. This plea seems a plea to the jurisdiction of the court, 12 East, 544. 6 Bing. 616. As to the title of the Term, and when an imparlance is necessary, see ante, 890, 891. 2 Saund. 2, note 2. According to a late case in the Common Pleas, a plea of privilege, after a special imparlance, is ill on demurrer, though the plaintiff cannot treat it as a nullity and sign judgment; it can only be pleaded after a general special imparlance, 6 Bing. 616. In 7 T. R. 447, n. d, however, it seems to have been considered that a plea of privilege may be pleaded with a special imparlance only. At all events a plea in abatement, entitled of a subsequent Term, without a special imparlance, would be bad, and the plaintiff might treat the plea as a nullity and sign judgment, 7 T. R. 442, n. d, or demur generally, 2 M. & S. 484. If a bill be filed against an attorney in vacation, with a special memorandum, he may plead within the first four days of the ensuing term without a special imparlance, 1 Chitty Rep. 704, ante, vol. i. 896.

(y) See ante, vol. i. Index, 292, and the precedents, 1 Lil. Ent. 3, 9.—1 Went. Index, iv. xviii. 8 T. R. 631.—1 Mod. Ent. 2, 11.—Lutw. 639. Sometimes the precedents commence by defending the wrong and injury, when, &c. and that the court ought not to take cognizance, and this will suffice, see 8 T. R. 631; but it seems more correct to omit the "when, &c." and only to conclude the plea by praying judgment, if the court will take farther cognizance of the suit, see 8 T. R. 186.—Gilb. C. P. 209.—Lutw. 639.—Latch. 178.

When an attorney, or other officer of the court is sued out of his own court, his plea of privilege may be considered as a plea to the jurisdiction; but when he is sued in his proper court, though by improper process, as by latitat, or original writ in the King's Bench, the plea may be considered as in abatement of the writ, and may conclude accordingly, as in the plea in Comerford v. Price, Dougl. 312, post, 898, which was held good on demurrer. There are precedents, however, which in both cases conclude "whether the defendant ought to be compelled to answer." 1 Wentw. 39, 40, 53, 64.—2 Saund. 209 d, e, in notes; and see 12 East, 544. If an attorney of the King's Bench be sued in the Common Pleas as an attorney of the Common Pleas when he is not so, and pleads his privilege in abatement, he should deny his being an attorney of the Common Pleas, see 1 Wentw. 41, and so vice versa, where an attorney of the Common Pleas and not of the King's Bench is sued in the King's Bench. When an attorney of the Common Pleas is sued in his own court, but not as a privileged person, the form is different, see 1 Went. 53, 64.—9 East, 424. A common person, sued as an attorney, should, if he mean to avail himself of the irregularity, plead in abatement, see 6 B. & Cres. 77, n.

(z) That this is a necessary averment, see 1 Salk. 1.—2 Stra. 864.—2 Lord Raym. 1667.

(a) This allegation is unnecessary, Lutw. 1666. Com. Dig. Abatement, D. 6.

(b) It is more correct thus than in the negative, 2 Lord Raym. 868, 898, 9; but the court take notice of the custom, id. ibid. and therefore a mistake is not material, 9 East, 424, 439.—Ante, vol. i. 202.

**PRIVILEGE.** and exempt from being compelled against their will, and have not, nor hath any or either of them, at any time or times whatsoever, hitherto been used or accustomed to be compelled to answer any plea or plaint, in any action personal, (pleas of freehold, felony, and appeals only excepted,) before any justice or minister of our said lord the king, or other judge whomsoever in any court whatsoever, except before the justice of our said lord the king of the court of the Bench at Westminster aforesaid, by bill filed in the said court, against such attorney or attornies as being present there [ \*897 ] in court (c); and this he the said defendant is ready to verify, wherefore he prays judgment of the said court of our said lord the king, before the king himself now here, will, or ought to take cognizance of the said plea (d)—[Add an affidavit (e) of the truth as infra.]

*In the King's Bench.*

Affidavit  
of the  
truth  
thereof  
(f).

Between

A. B. - - - - - plaintiff.

and

C. D. (g) gentlemen, one, &c. - - defendant.

C. D. of — gentlemen, one of the attornies of the court of — the defendant in this cause, maketh oath, and saith, that the plea hereunto annexed is true in substance and fact.

Sworn, &c.

C. C.

*In the King's Bench.*

— (h) Term, 1 William 4.

Plea of  
privilege  
by an attorney of  
K. B. sued  
by latitat  
(i).

C. D. gent. one, &c. }

ats.

A. B.

And the said defendant in his own proper person comes and defends the wrong and injury, and says, that before and at the time of the exhibiting the said bill of the said plaintiff in this suit, he the said defendant was, and from thence hitherto hath been, and still is, one of the attornies of the court of our said lord the king, before the king himself, present here in court, in his own person, and that he the said defendant, during all the time aforesaid, hath prosecuted and defended, and still doth prosecute and defend divers suits and [ \*898 ] pleas in the same court, for divers liege subjects of our said lord the king, as their attorney; and the said defendant further saith, that he and all other the attornies of the said court of our said lord the king, before the king himself, prosecuting and defending suits and pleas for their clients in the said court of our said lord the king, before the king himself, by an ancient and laudable custom from time immemorial used and approved of according to

(c) The plea may be pleaded with a proffer of the writ of privilege, and then it cannot be denied that he is an attorney, 2 Salk. 545.—Salk. 582.—Com. Dig. Abat. D. 6.

Quere if the plea ought not to traverse the defendant's being in the custody of the marshal.

(d) This conclusion is proper in this case, where the defendant is sued out of his own court, and it will suffice when he is sued as a common person in his own court, 12 East, 544, 5; as to the conclusions of pleas in abatement in general, see Tidd's Prac. 9th ed. 688.—Ante, vol. i. 899.

(e) See a general form of affidavit, 1 Lil. Ent. 1. It is doubtful whether a plea of priv-

ilege by an attorney need be verified by affidavit, 2 B. & P. 397.—Prac. Reg. 5.—Lil. Ent. 6, cites Salk. 1, 2, 8. Ante, vol. i. 401.

(f) Vide the preceding note.

(g) This is the usual form of affidavit. As to the certainty required, see ante, vol. i. 402.—Kenyon's Rep. 384—Say, 298. An affidavit that the plea is true will not suffice, Stra. 705.—Ante, vol. i. 402.

(h) As to the title of the Term, and when an imparlance is necessary, see ante, 895, n. x.—2 Saund. 2, n. 2.

(i) See the notes to the former precedent, and see 9 East, 424. How privilege is to be stated in C. P. see 1 Went. 67, 58.—9 East, 424.

the laws and customs of this realm, and the liberties and privileges of the said court, have been and ought to be in all personal suits, at the suit of any subject of our said lord the king, impleaded only by bill exhibited in the said court of our said lord the king, before the king himself, against such attornies respectively, as being present in the same court, in their own proper persons, and not as being in the custody of the marshal of the Marshalsea of our said lord the king, before the king himself (*k*), and this he the said defendant is ready to verify; wherefore because he the said defendant is not impleaded in this action as one of the attornies of the said court of our said lord the king, before the king himself, he the said defendant prays judgment whether he ought to be compelled to answer the said bill (*l*), &c.—[*Add affidavit of the truth of the plea, as ante, 897.*]

[*The following is the plea in Comerford v. Price, Dougl. 312, which was holden sufficient on demurrer.*]—And the said defendant in his proper person comes and defends the wrong and injury, and says that he ought not to be compelled to answer the said original writ because he says that the said defendant now is, and on the day of suing out the said original writ, and long before, was one of the attornies of the court of our said lord the king, before the king himself, and that according to the custom of the said court, and the privileges of such attornies, from time whereof the memory of man is not to the contrary, used and approved of in the same court, every attorney of the same court who is sued and impleaded in the same court of our said lord the king, before the king himself, in any personal action at the suit of any subject of this realm, during the time of his remaining and being an attorney of the said court, ought to be sued and impleaded in the said court as a privileged person, that is to say, by bill filed and exhibited in the same court against such attorney, as being present in the same court in his own proper person, and that no attorney of the said court ought nor of right hath at any time during all the said time whereof the memory of man is not to the contrary, against his will, been compelled to answer any person in any personal action prosecuted in the same court here by original writ sued out against him at the suit of any person. And the said defendant in fact saith, that he is impleaded by the original writ aforesaid against his will, and against the custom and privileges aforesaid. And this he is ready to verify, wherefore he prays judgment of the original writ sued out in this cause, and that the same may be quashed (*n*)—[*Add affidavit of the truth, as ante, 897.*]

Another plea of privilege by defendant as attorney of K. B. to an action by original (*m*).

[ \*899 ]

(*k*) *Quære* if the plea ought not to traverse the defendant's being in the custody of the marshal.

(*l*) As to the conclusions, see 12 East, 644, 646; and ante, 897, *n. d.*

(*m*) See form, Lil. Ent. 6. See form of plea of privilege of an officer of the Court of Chancery, 8 T. R. 681.

(*n*) See 12 East, 644; and ante, 897, *n. d.*

*In the King's Bench (or, Common Pleas.)*

Coverture  
of the  
plaintiff  
(p).

C. D. } — (d) Term, 1 William 4.  
ats. } And the said defendant, in his proper person (or, "by G. H.  
A. B. } his attorney,") comes and defends the wrong and injury, when,  
&c. and prays judgment of the said bill (or if by original, or in C. P. in-  
stead of "bill" say "writ") of the said plaintiff; because he says that the  
said plaintiff, before and at the time of the commencement of this suit (q),  
was and still is married to one E. F. then and yet her husband, who is still  
living, to wit, at, &c. (venue) aforesaid; and this he the said defendant is  
ready to verify, wherefore because the said E. F. is not named in the said  
bill (or if by original, or in C. P. say "writ") of the said plaintiff, the  
said defendant prays judgment of the bill (r) (or if by original, or in C. P.  
say "writ") aforesaid, and that the same may be quashed, &c.—[Add  
affidavit of the truth, as ante, 897.]

*In the King's Bench (or, Common Pleas.)*

— (s) Term, 1 William 4.

Coverture  
of the de-  
fendant  
(t).

C. F. sued by the name of C. D. }  
ats. } And the said defendant in this suit,  
A. B. } to wit, C. F. sued by the name of C.  
D. in her own proper person (u) comes and prays judgment of the said bill  
(or if by original, or in C. P. instead of the word "bill" say "the said  
writ and declaration") of the said plaintiff, because she says, that at the  
time of the exhibiting of the said bill, (or if by original, or in C. P. say  
"of the issuing of the said writ,") of the said plaintiff, she was and still is  
married to one E. F. who is still living, to wit, at, &c. (venue) aforesaid;  
and this she is ready to verify, wherefore because the said E. F. is not  
named in the bill (or if by original, or in C. P. say, "writ and declara-  
tion") aforesaid, she prays judgment of the said bill (w) (or if by original,  
or in C. P. say "writ and declaration,") and that the same may be quash-  
ed, &c. (x)—[Add affidavit of the truth, similar in substance to the form,  
as ante, 897.]

[ '900 ] *In the King's Bench (or, Common Pleas, or, Exchequer.)*

NON-  
JOINDER.

— (y) Term, 1 William 4.

Plea in as-  
sumpsit,  
that the  
contracts  
were made  
jointly  
with an-  
other per-  
son not  
joined  
(z).

C. D. }  
ats. } And the said defendant by E. F. his attorney (a), comes and  
A. B. } defends the wrong and injury, when, &c. and prays judgment (b)

(o) See the precedents, Ast. Ent. 9.—3  
Inst. Cl. 70. *id. puis darrein Continuance*,  
Thomp. Ent. 1. As to the title of the term, and  
when special imparlance is necessary, see vol.  
i. 896, 897.—Ante, 895, note x.—2 Saund.  
2, n. 2.

(p) See the precedents. 1 Went. 47.—*Id.* In-  
dex, ix.—Lil. Ent. 123.

(q) See Bac. Ab. Abatement, G.

(r) See note h, post, 900.

(s) As to the title of the term, and when an  
imparlance is necessary, see vol. i. 896, 7, and  
ante, 895, note x.—2 Saund. 2, n. 2.

(t) See forms, 6 M. & S. 220.—2 Rich. C.  
P. 1. Lil. Ent. 1. As to coverture of defend-  
ant after the writ, Bac. Ab. Abatement, G.  
Coverture can only be pleaded in bar, when  
the defendant was married at the time when  
the supposed contract was made. In other  
cases it must be pleaded in abatement, see

3 T. R. 681. See a form, post, 907, of a plea  
in bar of coverture as to part, and in abate-  
ment as to residue. Evidence of coverture.  
Roscoe on Evidence, 194, 5.

(u) In Lutw. 23, coverture was pleaded by  
attorney, but this is incorrect. See 2 Saund.  
209 a. Lil. Ent. 1.—2 Rich. C. P. 1.

(v) See note h, post, 900.

(w) The conclusion in Lut. 23, is different.

(y) When a special imparlance is necessary,  
see vol. i. 375; and ante, 895, note x.—2  
Saund. 2, n. 2. 2 M. & S. 484.

(z) See the precedents, 1 Went. Ind., and  
vol. i. 8, 32, 392; and see Lil. Ent. 12; and  
a precedent of a plea of another executor not  
joined, 2 Rich. C. P. 2.—1 Went. 13, 58.

(a) May be by attorney, Lutw. 696.

(b) In Moore, 30, and 1 Lutw. 11, it is said  
that a plea in abatement on account of matter  
dehors, should commence with a prayer

of the said bill (c), or if by original, or in C. P. instead of the word "bill" say "writ and declaration," (d) because he says that the said several supposed promises and undertakings in the said declaration mentioned, if any such were made, were, and each of them was, made by the said defendant jointly with one E. F. (e) who is still living (f), to wit, at, (g) &c. (the venue) and not by the said defendant alone; and this he the said defendant is ready to verify, whereof inasmuch as the said E. F. is not named in the said bill (or if by original, or in C. P. say "writ and declaration") together with the said defendant, he the said defendant prays judgment of the said bill (h), (or if by original, or in C. P. say "writ and declaration") (i) and that the same may be quashed, &c.—[Add affidavit of the truth, as ante, 897.]

NON-JOINDER.

\*In the King's Bench (or, Common Pleas.)

[ \*901 ]

— Term, 1 William 4.

C. D. and another, }  
ats. } And the said defendants by ——— their attorney,  
A. B. and another. } come and defend the wrong and injury, when, &c.  
and crave oyer of the said writing obligatory aforesaid, and it is read to them in these words, to wit, (here set out the obligatory part of the bond.) They also crave oyer of the condition of the said supposed writing obligatory, and it is read to them in these words, Whereas, &c. (here set out the condition of the bond, with names of witnesses and signatures, &c. verbatim), which being read and heard, the same defendants pray judgment of the writ and declaration aforesaid; (or if in K. B. by bill, say "of the said bill,") because they say, that at the said time of the sending and delivery of the writing obligatory aforesaid, whereon the said plaintiffs against them the said defendants complain, to wit, on the day and year aforesaid, above mentioned, at, &c. (venue) the said E. F. in the writing obligatory aforesaid named, did likewise seal and deliver the writing obligatory aforesaid, as the act and deed of the said E. F. to the said plaintiffs and became firmly bound to the said plaintiffs as aforesaid, jointly with the said defendants, by the same writing obligatory, in the said sum of [£100] which said E. F. is yet surviving and living, to wit, at, &c. (venue) and this they are ready to verify; wherefore, inasmuch as the said E. F. is not named defendant, together with the said defendants, in the

Non-jointer of a co-obligor in joint and several bond (k).

of judgment but only to conclude with it, and see ante, vol. i, 400; but this distinction does not seem attended to in Lil. Ent. 6.—Thomp. Ent. 1.—2 Saund. 209.

(c) As to prayer, judgment of the bill only and not of the bill and declaration, see 2 M. & S. 484, n. (a).

(d) When the plea in abatement for non-jointer is to the whole of the action, it is not necessary to plead in abatement both of the declaration and writ, but it is sufficient to plead to the writ or bill only, but where it is intended to plead in abatement only of part of the writ, and the cause of abatement arises from some of the counts of the declaration, the defendant must plead in abatement of both, 2 Saund. 210. n. c.; and the precedent, 2 B. & P. 420. See also 2 M. & S. 484, n. (a).

(e) The plea must disclose the names of all the contracting parties, so as to give a better writ, and if a name be omitted, the plaintiff may take issue on the plea, and will succeed on

the trial, 2 Bl. Rep. 951—2 Marsh. 302.—6 Taunt. 587, S. C. Kenyon's Rep. 364.

(f) A plea in abatement of nonjoinder of a party who should be a defendant, must aver that the party omitted is still living, 1 Saund. 291. a, n. 1, b, n. 4.

(g) No venue is necessary, 2 H. Bla. 161.—7 T. R. 243. 1 Saund. 8. (2)—8 T. R. 243.

(h) Quære if not bad, if pleaded of bill and declaration, 2 M. & S. 484. In proceedings by bill praying judgment of the "writ and declaration" would be bad. 1 B. & A. 172. As to conclusions of pleas in abatement, see ante, vol. i. 899. Tidd's Prac. 9th edit. 638.

(i) As to the introduction or omission of the word "declaration," vide 2 Saund. 209. d.—Tidd's Prac. 9th edit. 638.

(k) See 1 Saund. 291 a. n. 2 b. as to the form. See also forms, Lil. Ent. 2.—2 Rich. Prac. K. B. 17.—Ast. Ent. 7.—Lutw. 696. See a form in covenant, Lil. Ent. 7; and 2 Rich. Prac. K. B. 18. That defendant must

NON-  
JOINDER.

writ and declaration aforesaid, (or if in *K. B. by bill*, "in the said bill,") the same defendants pray judgement of the writ and declaration aforesaid, (or if in *K. B. by bill*, "of the said bill,") and that the same may be quashed, &c.—[*Add affidavit, as ante*, 897.]

MISNO-  
MER.

*In the King's Bench* (or, *Common Pleas*.)

— (1) *Term*, 1 *William* 4.

Misnomer  
of defend-  
ant's  
Christian  
name in  
*K. B. (m)*.  
[ \*902 ]

C. D. sued by the name of E. D. }  
ats. }  
A. B. }

And C. D. (n) against whom the  
said A. B. hath exhibited his said

bill by the name of E. D. in his own person (o), comes and says that he is named and called (p) by the name of C. D. and by that name and surname hath always since the time of his nativity hitherto been named and called; without this that he the said C. D. now is, or at the time of exhibiting the said bill was, or ever before had been, named or called by the name of E. D. (q) as by the said bill is supposed, and this the said C. D. is ready to verify, wherefore he prays judgment of the said bill (r), and that the same may be quashed, &c.

Affidavit  
the truth  
thereof (s).

*In the King's Bench*.

Between } A. B. - - - - - plaintiff,  
and  
C. D. sued by the name of E. D. defendant.

C. D. of, &c. — the defendant in this cause, maketh oath and saith, that the plea hereunto annexed is true in substance and fact.

Sworn, &c.

C. D.

*In the Common Pleas*.

— *Term* 1, *William* 4.

The like in  
C. P. (t).

C. D. sued by the name of E. D. }  
ats. }  
A. B. }

And C. D. against whom the said  
plaintiff hath issued his said writ, and

declared thereon by the name of E. D. in his own person, comes and says, that he is named and called C. D. and by that name and surname hath always since the time of his nativity hitherto been named and called; without this that the said C. D. now is or ever was, named or called by the name of E. as by the said writ and declaration thereon founded is [ \*908 ] supposed, and this the said C. D. is ready to verify, wherefore he prays

plead in abatement if he wish to take advantage of the non-joinder, see ante, vol. i. 82.

(i) As to the title of the term, see ante, 895, n. x.—1 T. R. 278; 7 T. R. 447.

(m) See the precedents, Lil. Ent. 6.—Tidd's forms, 182.—1 Wentw. Index.—Wilkes, 558.—2 Taunt. 899. In this plea the defendant must give his surname as well as his true Christian name, although his true surname is used in the declaration, 8 T. R. 515.—2 Saund. 309 b.—4 Taunt. 652, 8.

(n) The plea must not begin "and the said C. D." &c. or "he who is sued," &c. ante, 892, note d.—5 T. R. 487.—2 Saund. 209 b.—Lutw. 10.—5 Taunt. 652. As to the necessity for the surname being given, see supra, n. r. and the precedent, Rast. Ent. 297, 108.

(o) It appears most advisable to plead misnomer in person, 2 Saund. 209 b, c.—Summary on pleading, 50.

(p) Some precedents say, "called and

known," see Wilkes, 558; but the old Entries say "named and called," see Thompson. Ent. 1 Lutw. 10.—Rast. Ent. 297.—Lil. Ent. 1, which seems preferable. Some old precedents state that the defendant was baptized, &c. Lil. Ent. 6. and 1 B. & P. 645; but this is not only unnecessary, (see the above cases, and Rep. temp. Hardw. 286.—6 Mod. 116.) but difficult in proof, (1 Campb. 479) and consequently improper.

(q) A mis-statement of this name would be fatal on demurrer, 1 Chit. Rep. 705, n.

(r) See ante, 900, note q.

(s) See form of affidavit, ante, 897.—Lil. Ent. 1. 4. and ante, vol. i. 402. An affidavit that the plea "is a true plea," would be bad. Stra. 705.

(t) See forms, 1 Rich. C. P. 157.—2 Id. 4. As to the title of the Term, see ante, 895, n. x, 901, n. k. See 2 Saund. 209 b.—1 B. & P. 647, 8, 2. See the notes to preceding form



judgment of the said writ and declaration thereon founded, and that the same may be quashed, &c.—[*Add affidavit as in preceding form.*]

*In the King's Bench.*

— Term, 1 William 4.

C. D. sued by the name of C. E. }

ats.

A. B. }

And C. D. against whom the said plaintiff hath exhibited his said bill of defendant's surname in K. B. by bill (u).  
by the name of C. E. in his own proper person, comes and says, that he is named and called by the name of C. D. and by the said surname of D. hath always hitherto been called or known; without this that the said C. D. now is, or ever was, named or called, or known by the surname of D. as by the said bill is supposed; and this the said C. D. is ready to verify, wherefore he prays judgment of the said bill, and that the same may be quashed, &c.

*In the King's Bench.*

— Term, 1 William 4.

C. D. }

ats.

A. B. suing by the name of A. D. } And the said defendant in his own proper person, comes and defends the wrong and injury, when, &c. and prays judgment of the said bill, because he says that the said A. (*his Christian name*) the now plaintiff, now is, and before and at the time of exhibiting the bill aforesaid, was called and known by the surname of B. (*his real name*) to wit, at, &c. (*venue*) aforesaid, without this the said A. (*his Christian name*) the now plaintiff, now is, or before or at the time of exhibiting the bill aforesaid, was called or known by the surname of D. (*the surname by which the plaintiff has sued*) as in and by the said bill is above supposed, and this he the said defendant is ready to verify, wherefore he prays judgment of the said bill, and that the same may be quashed, &c.

*In the King's Bench.*

— (x) Term, 1 Will. 4.

C. C. }

ats.

A. B. }

And the said defendant by — his attorney, comes and defends the wrong and injury, when, &c. and prays judgment of

ANOTHER ACTION. PENDING.

Another action depending for the same cause, in K. B. (y) [ \*904 ]

(u) As to the term, see ante, 901, n. s.— See the precedent, 1 Wentw. Index; of Christian and surname, 1 Wentw. 1.—Rast, Ent. 106, 297.—Thomp. Ent. 1.—Plead. Assnt. 452.—Lil. Ent. 1, 2—5 Taunt. 652, 553.

(v) See the precedent, 1 East, 542.—1 Lit. Ent. 4.—It is necessary to plead in abatement, 2 B. & B. 34.—4 Moore. 369, S. C.; and see 2 Taunt. 393.

(x) As to the title of the term, and when a special imparlance is necessary, see ante, vol. 1. 896, 7; ante, 896, n. x. and 1 Mod. Ent. 6.

(y) This plea cannot be pleaded in bar, 5 B. & A. 101.—Lutw. 33.—3 Inst. 1. 56; unless in a penal action, Sayer, 216. As to these pleas in general, see Com. Dig. Abat. H. 24.—Bec. Abr. Abat., M.—1 Campb. 60; and the precedents nearly similar to the

above in 1 Wentw. 8.—1 Mod. 6.—Lil. Ent. 2, 7, 11. The precedents of the pleas in abatement of another action depending, vary in point of form; sometimes they set forth the declaration in the first action, but others, as in the above precedent, are more concise. Precedents of the first description are in 3 Ld. Raym. 53.—Clift. Ent. 2, 22. 1 Mod. Ent. 10.—2 Salk. 716.—1 Went. 44, 52, 64.—3 Wentw. 40; and in *scire facias*, 2 Lil. Ent. 392. Those of the latter description are in 3 Ld. Raym. 57.—Lutw. 33.—Lil. Ent. 7.—Mod. Ent. 6.—Clift. Ent. 8.—1 Wentw. 8.—It is said that when the writ is general, and does not express the cause of action, the plea in abatement must show that the plaintiff declared in the former suit, because otherwise it cannot be traversed whether or not it were for the same cause of action, 5 Co. 61 b. and Lil. Prac. Reg.

ANOTHER  
ACTION  
PENDING.

[ \*905 ]

the said bill (z), because he says, that before the exhibiting of the said bill to, in Michaelmas Term (a), in the ——— year of the reign of our lord the now king, (or in the *Exchequer* say “in his said Majesty’s Court of Exchequer, before the barons of the said Exchequer at Westminster,”) in the court of our said lord the king, before the king himself, the said court then and still being holden at Westminster, in the county of Middlesex, the said plaintiff impleaded the said defendant and exhibited his certain bill against him, in a plea of debt on demand of and upon the same identical writing obligatory (or, *if in assumpsit*, “in a certain plea of trespass on the case, upon and for the not performing of the very same identical “promises and undertakings”) in the said declaration in this present suit mentioned (b); as by the record and proceedings thereof remaining in the said court of our said lord the king, before the king himself, to wit, at Westminster aforesaid, more fully appears. And the said defendant further saith, that the parties in this and the said former suit are the same, and not other or different persons; and that the said former suit so brought and prosecuted against the said defendant, by the said plaintiff as aforesaid, is still depending in the said court of our said lord the king, before the king himself (c), and this the said defendant is ready to verify (d), wherefore he prays judgment of the said bill (e), in this suit, and that the same may be quashed, &c.

8 E.—Bac. Abr. tit. Abatement, M, but this reason does not appear satisfactory, for in most instances, and particularly in declarations, *in indebitatus assumpsit* the declaration is so general, that it does not conclusively show that the two actions are for the same cause. See 6 T. R. 807. 8 Wentw. 142; and by the plaintiff’s particulars of demand in the first action or otherwise, it may appear what was the subject-matter of the first action, though the plaintiff may not have declared, and it is now settled, that in a plea in bar of judgment recovered, it is not necessary to set out the declaration in the former case. 1 Saund. 92, note 2; and therefore we may conclude that the above concise form will suffice. If, however, it appears from the pleading that the action pending could not be for the same cause, the plea would be bad, 4 B. & B. 920. 7 D. & R. 409, S. C. Therefore, where the assignees of a bankrupt, declared on promises, to the bankrupt, and also on promises to themselves, and the defendant pleaded generally the pendency of a prior action by the bankrupt, it was held bad, *Id.*

(z) Sometimes the plea commences and concludes with a prayer of judgment, whether the defendant ought to be *compelled to answer*, &c. Lil. Ent. 6; but the above form seems most correct.

(a) When it is necessary to state a particular day, 2 Lev. 141.—3 Burr. 1428. 1 Bla. Rep. 489. S. C. When the actions were both commenced in the same Term, then show when the first was commenced.

(b) As to this concise statement, without setting out the former declaration, see ante, 903, 4, d. y.

(c) As to this averment, see Bac. Abr. Abatement, M. *Sed quare*, see opinion, 1 Wentw. 8.

(d) It should seem, it is not necessary to aver a *prout patet per recordum*, or to plead the record of another court, *sub pede sigilli*, because the plea involves a matter of fact, whether both actions are for the same case of action, see 1 Stra. 522.

(e) See ante, 901, n.

# •PLEAS IN BAR.

## COMMON COMMENCEMENTS AND CONCLUSIONS.

*In the King's Bench* [or "*C. P.*" or "*Exchequer.*"]  
 (C. D. ) *Term, 1 Will. 4.*  
 ats. } And the said (g) defendant by E. F. his attorney (h), comes  
 A. B. } and defends the wrong *(or in trespass or ejectment, instead of the*  
*word "wrong" say "force,"* and injury, when, &c. and says that the  
 said plaintiff ought not to have or maintain his aforesaid action thereof  
 against the said defendant (i) because he says, that, &c. [*Here state the* *Actio non.*  
*subject-matter of the defence, after which conclude either to the country,*  
*or with a verification, as the plea may require, as in the following forms.*]

*In the K. B. (or "C. P." or "Exchequer.")*  
 next after (l), *Term, 1 Will. 4.*  
 (C. D. )  
 ats. } And the said defendant by E. F. his attorney, comes and de-  
 A. B. } fends the wrong *(or in trespass or ejectment, instead of the*  
*"wrong" say "force,"*) and injury, when, &c. and says, that the said  
 plaintiff ought not further to have or maintain his aforesaid action thereof  
 against the said defendant, because he says, that, &c.

And for a further plea in this behalf, the said defendant, by leave *(or if*  
*a third or subsequent plea, say "by like leave")* of the court here, for  
 this purpose first had and obtained, according to the form of the statute in  
 such case made and provided (m) says that the said plaintiff ought not to  
 have or maintain his aforesaid action thereof against him, because he says,  
 that, &c.

And for a further plea in this behalf, as to the said first count of the  
 said declaration, [*or if in covenant, "as to the said supposed breach*  
*of covenant first above assigned," or if in trespass "as to the breaking*  
*and entering, &c." enumerating the particular trespasses mentioned in the*  
*declaration, and intended to be justified,*] the said defendant, by leave of  
 the court here, for this purpose first had and obtained, according to the  
 form of the statute in such case made and provided, says, that the said  
 plaintiff ought not to have or maintain his aforesaid action thereof against  
 him, because he says, that, &c.

(f) Usually the term of which the plea is pleaded, see vol. i. 468. As to the title of the term, and when an imparlance is necessary see ante, vol. i. 876, 897.—Ante, 890.

(g) When this word is improper, see ante, 892, &c.

(h) An infant or feme covert, cannot plead by attorney, ante, 898, 899.

(i) This is technically the *actio non*.

(k) When the subject-matter of the defence

has arisen, since the commencement of the action, this mode of pleading must be adopted. 4 East, 502. See form, post, 918, &c.

(l) The plea should be entitled after the matter of the defence arose.

(m) 4 Anne, c. 16, s. 4, 5. It is proper to mention the statute in the introductory part of the plea as above. Andr. 108.—1 Wills 219.—Cowp. 600, 601.—1 Hen. Bl. 275 278.

1. Commencement of a first plea when special.

2. The like where the matter of the defence arose after commencement of the action. (k).

3. Commencement of a second or subsequent special plea.

4. The like to particular count on particular trespasses, &c.

[\*907]

COMMENCE-  
MENTS AND  
CONCLU-  
SIONS.

[After stating the subject-matter of the plea, if it be a denial of an allegation in the declaration, not being matter of record, the plea should conclude to the country, as follows:] And of this the said defendant puts himself upon the country, &c.

5. Conclu-  
sion to the  
country.

6. Conclu-  
sion with a  
verifica-  
tion.

7. Conclu-  
sion with a  
verification  
by the  
record.

~~[If the defense consists of an allegation of new matter, it should in general conclude with a verification, 1 P. W. 258, thus:]~~ And this the said defendant is ready to verify, wherefore he prays judgment, if the said plaintiff ought (or if matter pending the suit be pleaded, say it ought further,) to have or maintain his aforesaid action thereof against him, &c.

And this the said defendant is ready to verify by the said record, wherefore he prays judgment, if the said defendant ought to have or maintain his aforesaid action thereof against him, &c.

## PLEA IN ABATEMENT AS TO PART, AND IN BAR TO THE REST.

Plea in C. P. of coverture, and in abatement to part, and of general issue and coverture in bar to the rest (n).

*In the King's Bench, (or "C. P." or "Exchequer.")*

C. D. } *Term, 1 William 4.*  
ats. } And the said defendant in her own person comes and defends  
A. B. } the wrong and injury, when, &c. and as to the said [first and second] counts of the said declaration, says that she did not undertake or promise in manner and form as the said plaintiff hath above complained against her, and of this she puts herself upon the country, &c.

And for a further plea as to the said (first and second) counts of the said declaration, the said defendant, by leave, &c. (as ante, 906, third form) because she says, that she, the said defendant, before and at the time of the making of the said several supposed promises and undertakings in the said [first and second] counts mentioned, and before and at the time the said supposed causes of action therein mentioned did accrue, was and still is the wife of T. J. who is still living, to wit, at, &c. (venue); and this, &c.—[Conclude with a verification, as ante, 907, sixth form.]

And as to so much and such part of the said bill, [or if in C. P. or by original, instead of the word "bill" say "writ and declaration,"] of the said plaintiff, as relates to the said several supposed promises and undertakings in the said third and subsequent counts mentioned; and as to those counts the said defendant prays judgment of that part of the said bill [or if in C. P. or by original, instead of the word "bill" say "writ and declaration,"] which relates to the said last-mentioned supposed promises and undertakings, and of the said third and subsequent counts, and that they may be respectively quashed, because she says, that at the time of the exhibiting the said bill [or if in C. P. or by original, say "at the time of the issuing of the said writ,"] of the said plaintiff in this behalf, and the commencement of this suit, she was and still is married to the

(n) See ante, vol. i. 896, as to pleading in bar, and abatement, at same time.

mid T. J. who is still living, to wit, at, &c. (*venue*) aforesaid; and this she is ready to verify, wherefore because the said T. J. is not named in the said bill [or if in *C. P.* or by original, instead of the word "bill" say "writ and declaration,"] in this behalf she prays judgment of so much and such part of the said bill [or if in *C. P.* or by original instead of the word "bill" say "writ and declaration,"] as relates to the said supposed promises and undertakings in the said third and subsequent counts mentioned. And also of the said third and subsequent counts, and that the same may in this behalf be quashed, &c.

FILE IN  
ABATEMENT

## \*IN ASSUMPSIT.

[ \*908 ]

In the *K. B.* or "*C. P.*" or "*Exchequer.*"

GENERAL  
ISSUE, &c.

C. D. } — Term, 1 Will. 4. General issue, non-assumpsit (o).  
ats. } And the said defendant by — his attorney, comes and defends  
A. B. } the wrong and injury, when, &c. and saith that he did not undertake or promise (p) in manner and form as the said plaintiff hath above thereof complained against him, and of this he puts himself upon the country, &c.

C. D. & others, }  
ats. } And the said defendant C. D. by — his attorney, The like by one of several defendants.  
A. B. } comes and defends the wrong and injury, when, &c. and saith that he, together with the said E. E. (*the other defendant or defendants*) did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against him, and of this the said defendant, the said C. D. puts himself upon the country, &c.

C. D. exor. &c. }  
ats. } And the said defendant by E. F. his attorney, comes The like by an executor or administrator (q).  
A. B. } and defends the wrong and injury, when, &c. and says that the said G. H. (r) deceased, in his life-time, did not undertake or promise (*and if there be promises by the executor laid in the declaration say, "nor did the said defendant undertake or promise,"*) in

(o) See forms, Morg. 217.—1 Rich. C. P. 147; and see forms where two of several defendants plead non assumpsit. 1 Lil. Ent. 106. Rich. C. P. 18.

(p) The omission of the words "or promise" would be bad on demurrer, but the plaintiff cannot sign judgment. 8 D. & E. 921. A plea

of "not guilty," would be bad on demurrer, Stra. 1022.—Cases Temp. Hardw. 178.

(q) See forms, 1 Rich. C. P. 147

(r) If the declaration contain counts on promises by the executor in that character, the plea must also deny those promises.

GENERAL  
ISSUE, &c.

manner and form as the said plaintiff hath above thereof complained against the said defendant, and of this he puts himself upon the country, &c.

Plea that the contracts were made by defendants jointly with one of the plaintiffs (s).

[ "909" ] To a declaration on a guarantee that the person for whom defendant became guarantee was a feme covert (t).

[ *First plea, general issue; and the commencement of the second plea as ante 906, third form, and then as follows:* ] Because they say that the said several supposed promises and undertakings, in the said declaration mentioned, if any such were or was made, were, and each and every of them was made by them the said defendants, together with the said A. B. one of the said plaintiffs jointly, and not by them the said defendants separately, from and without the said A. B. to wit, at, &c. (*venue*) aforesaid, and this, &c.—[ *Conclude with a verification, as ante, 907, sixth form.* ]

[ *First plea non assumpsit, as ante, 908; second plea, actio non, as ante, 906, third form.* ]—Because he says, that long before and at the time when the said M. O. was supposed in and by the first and second counts of the said declaration to have become indebted to the said plaintiff, and from thence continually until the making of the said supposed promises and undertakings in those counts respectively stated, the said M. O. was the wife of one L. O. which said L. O. at the time of the accruing of the said supposed debt to the said plaintiff, and during all the time aforesaid, was the husband of the said M. O. and in full life, to wit, at, &c. (*venue*) aforesaid; and this, &c.—[ *Conclude with a verification, as ante, 907, sixth form.* ]

Plea confessing causes of action in certain counts, and certain damage there by sustained, and general issue to the residue (u).

C. D. }  
ats. } And the said defendant by — his attorney, comes and defends the wrong and injury, when, &c. and as to the said [ *first and second* ] (*the counts confessed*) counts of the said declaration mentioned, confesses the said action of the said plaintiff as to the non-performance of the said supposed promises and undertakings, in those counts mentioned, and that he the said plaintiff, by reason of the non-performance of the said promises and undertakings in those counts mentioned, hath sustained damage to the amount of — (*insert enough*), over and above his costs and charges by him about his suit in that behalf expended, and which said sum of — he the said defendant hath always been ready and willing, and still is ready and willing to pay to the said plaintiff. And the said defendant, as to the (*third* and subsequent) counts of the said declaration mentioned, says, that he did not undertake or promise in manner and form as the said plaintiff hath above in those counts complained against him, and of this he puts himself upon the country, &c.—[ *Add any other plea as usual to the counts not confessed.* ]

(s) As to this plea, see ante, vol. i. 28. 2 B. & P. 124, 5.—2 D. & R. 196.—1 B. & C. 74, S. C.—In *Moffat and others v. Van Milligen and others*, Mich. Term. 27 Geo. 3.—2 Chit. Rep. 539, a plea in abatement to the same effect was held bad on demurrer. See plea by an executor, that testator had a partner who survived him. 5 East, 261. The matter of the above plea may be given in evidence under the general issue, and in a late case in the court of C. P. where the defendant, besides the general issue, attempted to plead a plea somewhat similar to the above, though more complex, that court would not allow it. 6 Bingh. 197.

(t) This may be pleaded specially. 4 Bing. 470.

(u) This plea may be advisable in cases where the defendant admits a cause of action against him, but cannot pay money into court as is frequently the case. By the above mode of confession it should seem the expenses of a writ of inquiry or trial, upon the admitted cause of action, may be avoided. See a form in case, post, 1080, and a form to a new assignment in trespass, post, 1237. See also 9 B. & Crea. 613.

[*First plea, non assumpsit, as ante, 908 ; second plea, actio non, as ante, 906, third form, to the special counts on the collateral promises.*—Because he saith, that the several supposed promises and undertakings in the said [*first and second*] counts respectively mentioned, were special promises, and each of them was a special promise for the debt of another person, to wit, the said A. P. and that no agreement in respect of, or relating to, the supposed causes of action in the (first and second) counts of the said declaration, or either of them, nor any memorandum, or note thereof, wherein the considration or considerations for the said special promises, or either of them, was or were stated or shown, was or is in writing, or was or is signed by the said defendant, or by any other person by him thereunto lawfully authorized, according to the form of the Statute in such case made and provided ; and this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

STATUTE  
OF  
FRAUDS.  
Statute of  
Frauds to  
a declara-  
tion on a  
guarantee  
(w).

[*First Plea, non assumpsit, as ante, 908 ; second plea, actio non, as ante, 906, third form to the count on the bill.*] Because he says, that before the making of the said bill of exchange in the said first count, mentioned, to wit, on the 21st day of December, A. D. 1829, [*day of contract or about it*] at, &c. (*venue*) aforesaid, it was corruptly and against the form of the Statute in such case made and provided, agreed by and between the said E. F. (*the acceptor*) and one G. H. that he the said G. H. (*here state the usurious agreement, which, in the case for which this plea was drawn was thus :*) should lend and advance to the said E. F. a certain sum of money, to wit, the sum of £750 in manner following, that is to say, part thereof, to wit, £250 on the day and year last aforesaid, and the residue thereof, to wit, £500 at a certain time, to wit, on the 31st day of December then next, and that he the said G. H. should forbear and give day of payment of the sums of £250 and £500 from the times of lending and advancing the same, until and upon a certain other time, to wit, the 10th day of April, 1830, and that for the forbearing and giving day of payment of the said sums of £250 and £500, as aforesaid, the said E. F. should give and pay to the said G. H. a certain sum of money, to wit, the sum of £250 of like lawful money, and that for securing the repayment of the said sums of £250 and £500 so to be lent and advanced as aforesaid, together with the said further sum of £250 on the said 10th day of April in the year last aforesaid, the said defendant should make and draw and indorse, and the said E. F. should accept the said bill of exchange in the said [*first*] count mentioned, and that the said E. F. should deliver the same to the said G. H. ; and the said defendant further saith, that in pursuance and in part-performance of the said corrupt and unlawful agreement, the said defendant afterwards, to wit, on the said 21st day of December, to wit, at, &c. (*venue*) aforesaid, made and drew and indorsed, and the said E. F. then and there accepted the said bill of exchange and the said

USURY.  
To action  
by indorsee  
against  
drawer of  
a bill, that  
the bill  
was given  
to secure  
the per-  
formance  
of an  
usurious  
contract  
between  
the accept-  
or and a  
third per-  
son (x).

(w) On demurrer this plea has been held good. 1 Moo. & P. 294.—4 Bing. 470, S. C.—See form, 1 Wils. 305.—See 4 B. & A. 596.

(x) The defense of usury may be given in evidence in assumpsit or debt, on simple contract, under the general issue, 1 Stra 498.—Com. Dig. Plead. 2 G. 7. 1 Saund. 295 b. n. but it may be frequently advisable to plead it. When pleaded the usurious contract must be

set forth particularly, a general plea of usury being bad on demurrer, 2 M. & S. 877. A variance between the averment in the plea and the evidence, with respect to the usurious contract, would be fatal to such plea, 1 Saund. 295 n.—3 T. R. 538—1 Taunt. 511, and see the notes, ante, 512, in the form of plea in debt on bond, and notes, post, 966. See the replication to the above plea, ante, 1146.

## USURY.

E. F. then and there delivered the said bill of exchange so made, and indorsed, and accepted as aforesaid, to the said G. H. on the terms aforesaid, and that in further pursuance of the said corrupt and unlawful agreement, the said G. H. afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, did lend and advance to the said E. F. the sum of £250, part of the said sum of £750; and afterwards, to wit, on the 31st day of December, in the year 1829 aforesaid, at, &c. (*venue*) aforesaid, did lend and advance to the said E. F. the said further sum of £500; and the said defendant further saith, that the said sum of £250 so agreed to be given and paid by the said E. F. to the said G. H. for such loan and forbearance as aforesaid, and so secured as aforesaid, exceeds the rate of £5 for the forbearing of £100 for a year, contrary to the Statute in such case made and provided, whereby and by force of the Statute in such case made and provided, the said bill of exchange was and is wholly void; and this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

INFANCY.  
Infancy of  
defendant  
(y).

C. D. }  
ats. } And the said defendant by E. F. his attorney, (or if the de-  
A. B. } fendant be still an infant, say by "G. H." admitted (z) by the  
court of our said lord the king, before the king himself, (or in C. P. "by  
the justices of our said lord the king here,") as guardian (a) of the said  
defendant, to defend for the said defendant, who is an infant under the age  
of twenty-one years,) comes and defends the wrong and injury, when  
&c. and says that the said plaintiff ought not to have or maintain his afore-  
said action thereof against him, because he says, that he the said defend-  
ant at the time of making of the said several supposed promises and under-  
takings in the said declaration mentioned, was an infant within the age of  
twenty-one years, to wit, of the age of — years, (b), to wit, at, &c.  
aforesaid (c); and this, &c.—[*Conclude with a verification, as ante, 907,  
sixth form.*]

COVERTURE.  
Coverture  
of defend-  
ant (d).  
[\*910]

C. D. }  
ats. } And the said defendant in person (e) comes and defends the  
A. B. } wrong and injury, when, &c. and says, "that the said plaintiff  
ought not to have or maintain his aforesaid action thereof against her, be-

(y) See precedents, 1 Rich. C. P. 158. Plead. 450.—Lil. Ent. 8, 107. Infancy may be given in evidence under the general issue in *assumpsit*.—1 B & P. 481, n. a.—*Ante*, vol. i 417. But it is in general better to plead it. *Ante*, vol. i. 421. It may be pleaded with another plea. As to proof of, see 8 Stark. 68.—4 Taunt. 465.—Roscoe, Evidence, 196, 6, 7.

(z) This should be stated.—2 Saund. 117 g. n. 1.

(a) An infant must defend by guardian, and not by *prochein amy*. 2 Saund. 117, f. n. 1. *Ante*, 898.

(b) The precise age is not here material.

(c) The venue in the declaration, but the omission would not prejudice. 2 H. Bla. 161. 1 Saund. 8 a.

(d) See form, Morg 249.—Coverture may

in *assumpsit*, and indeed in debt, be given in evidence under the general issue; but it is frequently advisable to plead it. 12 Mod. 101. When the defense is not that the feme was married at the time the contract was made, but merely that her husband ought to be joined in the action, the coverture must be pleaded in abatement, and not as above in bar, *ante*, 899, n. See a form of plea of coverture in abatement as to part, and in bar as to the residue, *ante*, 907.—Evidence in support of Roscoe Evid. 194, 5. 1 Campb. 62.—2 Campb. 113.

(e) If the defendant be still married, she must plead in person and not by attorney, *ante*, 899, n. In an action of *assumpsit* for use and occupation by the defendant's wife before marriage, defendant cannot plead she is not his wife, as such plea would amount to the general issue. 2 Chit. Rep. 642.



cause she says, that she the said defendant before and at the time of making of the said several supposed promises and undertakings in the said declaration mentioned, was and still is the wife of one G. D., to wit, at, &c. (*venue*) aforesaid; and this, &c.—[*Conclude with a verification, as ante*, 907, *sixth form*.]

COVER-  
TURE.

[*Actio non, as ante*, 906, *first form*.]—Because he says, that the said plaintiff is an alien, born in foreign parts, out of the allegiance of our lord the now king, and within the allegiance (*g*) of a foreign state, to wit, or, &c. to wit, at, &c. (*venue*) aforesaid, and not made a subject of our said lord the king, by naturalization, denization, or otherwise; and the said defendant further saith, that long before, and at the time of the making of the said supposed promises and undertakings in the said declaration mentioned, the persons exercising the powers of government in the said foreign state of — aforesaid, were and still are at war with, and enemies of our said lord the king, to wit, at, &c. (*venue*) aforesaid; and that the said plaintiff so being such alien born as aforesaid, and an enemy of our said lord the king, and not a subject of our said lord the king by naturalization, denization, or otherwise, entered and came into this kingdom, and still remains herein, not having any letters of safe conduct from [ \*911 ] our said lord the king, or any license or permission of our said lord the king, to be, reside, or remain in this kingdom; and this, &c.—[*Conclude with a verification, as ante*, 907, *sixth form* (1).]

ALIEN  
ENEMY  
Plaintiff  
an alien  
enemy  
resident  
here (*f*)

*Third plea, actio non, ante*, 906, *third form*.]—Because he says, that the said plaintiff is an alien, born in foreign parts out of the allegiance of our said lord the king, and within the allegiance of a foreign state, to wit, in, &c. aforesaid, that is to say, at, &c. (*venue*) aforesaid, and not a subject of our lord the king, by naturalization, denization or otherwise; and the said defendant further saith, that at the time of the commencement of this suit, the persons exercising the powers of government, in, &c. aforesaid, were and still are at war with, and enemies of our said lord the king, to wit, at, &c. (*venue*) aforesaid; and that the said plaintiff so being such alien born, and such enemy as aforesaid, at the time of the com-

Plaintiff  
alien ene-  
my resi-  
dent  
abroad (*h*)

(*f*) The court of C. P. will not permit the defendant to plead double, viz. the general issue and alien enemy, 1 B. & P. 222, and see *Tidd's Prac.* 9th edit. 655. As to this plea and the replication, see 8 T. R. 166.—*Rast. Ent.* 22.—4 Mod. 405.—4 East, 502.—8 Wentw. 256.—*Chit. jun. on Con.* 50.—*Stat.* 43 G. 3, c. 155. This defense may be given in evidence under the general issue; but if the disability incurred by war *after* the contract was made, the same should be pleaded specially. *Ante*, vol. i. 419. Alien enemy may be pleaded in abatement, see *forms*, 1 Wentw. 7, 42, 51.—12 *Ent.* 1.—*Ant.* 11, and others, 1 *Wentw. Index*.—As the court will not in general allow a defendant to plead alien enemy with

any other plea, [see 1 B. & P. 222.—2 B. & P. 72.—12 East, 206.—10 East, 326.—*Ante*, vol. i. 478,] it may be advisable to plead alien enemy in abatement, and when the plaintiff was not an enemy at the time the contract was made, as the right is only suspended, the plea must be in abatement, 15 East, 280.—3 Camp. 152.

(*g*) The meaning of this word, see *Cobbett's State Tri.* 538.—7 Co. 2, and 1 Bos. & Pul. 164, &c.

(*h*) See the notes to the former precedent, and 4 East, 522.—An Englishman living in an enemy's country cannot sue, 8 Bos. & Pul. 118.

(1) This plea is not sufficient; for it is not enough to state that the plaintiff had no license to remain in the country, but it must be averred that he had been ordered by the sovereign to leave the country, for until then a license is to be presumed, 10 Johns. 70

ALIPH  
ENEMY.

mencement of this suit, was and still is resident and living out of this kingdom, and within the — aforesaid (1), and adhering to the said enemies of our lord the king, &c.; and this, &c.—[*Conclude with verification, as ante, 907, sixth form.*]

BANK-  
RUPTCY.  
Bankruptcy and certificate of defendant, under the 6 Geo. 4. c. 16 (i).  
[ '912 ]

[*Actio non, ante, 906, first form.*].—Because he says, that after the making of the said several supposed promises and undertakings, and accruing of the said several causes of action in the said declaration mentioned, if any such were made or accrued [and before the exhibiting of the bill of the said plaintiff in this behalf, (*or in C. P.* "before the commencement of this suit,")] (*k*), to wit, on the — day of — A. D. — ho the said defendant became a bankrupt, within the true intent and meaning of the Statute then in force concerning bankrupts, to wit, at, &c. (*venue*) aforesaid, and that the said supposed causes of action in the said declaration mentioned, if any such there be, and each of them did accrue to the said plaintiff before the said defendant so became a bankrupt as aforesaid (*l*), to wit, at &c. (*venue*) aforesaid, and of this he the said defendant puts himself upon the country, &c. (*m*).

(i) See forms, Lill. Ent. 107.—2 Rich. C. P. 64, see a form in debt, Morg. 529, and see several other forms, post, 913 to 919. See a plea of defendant's discharge under Scotch sequestration, 4 D. & R. 658.—See a plea of bankrupt in Ireland, 2 Hen. Bl. 554, in America, 5 East, 124.

This defense must be pleaded, 1 Camp. 363.—12 East, 664. The defendant may also plead the general issue and any other plea.

This plea is given by the 6 Geo. 4. c. 16. s. 126, and if the certificate were allowed before the action was commenced, or after the action, but before plea, provided the act of bankruptcy was committed before the commencement of the action, this general form will suffice, see 9 East, 82 (which seems to qualify the *dictum* in the latter part of the case in 6 East, 418, and in 2 Smith, 659).—Ante, vol. i. 569, and 8 Wentw. 188 a, b. But if defendant did not become bankrupt until after action brought, or did not obtain his certificate till after issue joined, the plea should be special, setting out the proceedings, and showing the allowance of the certificate by the chancellor, 6 T. R. 605, 607. See form, post, 913. And if the defendant omit to plead his bankruptcy and certificate, and judgment be obtained against him, he cannot plead his certificate to an action on such judgment, 6 B. & C. 105.

The bankruptcy of the plaintiff may be given in evidence under the general issue in assumpsit, 7 T. R. 396.—Bul. Ni. Pri. 153.—15 East. 622.—3 Campb. 286. If it be pleaded specially, all the proceedings must be set forth, 1 B. & P. 448.—See post, 918. See the forms, 7 East, 53.—3 T. R. 140. 1 Went 308, 9.—3 Went. Index, xvii. In assumpsit by the pro-

visional assignee, the fact of the bankrupt's estate having been assigned by the plaintiff to the new assignees between the time of issuing the latitat and delivery of the declaration, must be pleaded specially, 4 B. & A. 345.

Bankruptcy cannot be pleaded by bail, 2 Bos. & Pul. 45. When defendant cannot plead bankruptcy *pius darrein continuance*, to action on bail bond after proceedings having been stayed, 4 B. & A. 249.

As to when the defendant may avail himself of his bankruptcy where the plaintiff has proved his debt under the commission, and for form of plea stating such proof, see 5 B. & A. 95.—1 B. & A. 121.—1 Rose, B. C. 98.—6 Taunt. 549.—Post, 917. As to plea under 6 Geo. 4. c. 16; see post, 916.

(*k*) It does not seem necessary to insert the words within the brackets, 6 East, 418.—6 East, 82. The 6 Geo. 4. c. 16. s. 126, does not seem to require such allegation in the plea, and it is in general better omitted.

(*l*) This allegation is necessary, and will be proper, though the cause of action was not complete before the act of bankruptcy, 4 T. R. 156.—5 B. & A. 17. This will suffice in action by surety against bankrupt, though the payment was made afterwards, 5 B. & A. 17.—Post, 916.

(*m*) The plea is to conclude to the country, 1 P. Wms 258, 9.—10 Mod. 160, 247, and the plaintiff cannot reply specially, 2 M. & S. 549.—3 Camp. 499, n. a. S. C.—1 B. & A. 22, *ante* if the plea be special. In K. B. the plea need not be signed by counsel, 6 T. R. 496, but in C. P. it must be signed by a sergeant, 3 B. & P. 171. It must be delivered, 2 B. & A. 392.

(1) It is altogether unnecessary to aver the plaintiff's residence in the enemy's country; for the fact of his being an enemy, cannot depend upon any locality; but is sufficient to state that he is an enemy, or adhering to the enemy, or what is equivalent thereto, 6 Binney, 241, *Et vide* 10 Johns. 183, 184.

(*In the King's Bench, (or "C. P." or "Exchequer.")*)

BANK-  
RUPTCY.

— next after —, in  
— (n) Term, 1 Will. 4.

[*First plea, general issue, as ante, 908; second plea, common plea of bankruptcy, as ante, 911; and third plea, as follows:*]—And for a further plea in this behalf, the said defendant by leave of the court here, for this purpose first had and obtained, according to the form of the Statute in such case made and provided, says that the said plaintiff ought not further (p) to have or maintain his aforesaid action thereof against the said defendant, because he says, that the said defendant, before and on, &c. [*day of act of bankruptcy or about it*] and from thence continually, until the suing out the commission of bankrupt hereinafter mentioned, was a — [*state what trade he was*] dealer and chapman, and a trader, according to the provisions of an Act passed in the sixth year of the reign of our late lord King George the Fourth, intituled, "An Act to amend the laws relating to bankrupts;" and during all that time did use and exercise the trade of a dealer and chapman, and was a trader according to the provisions of the said Act, to wit, at, &c. (*venue*) aforesaid. And the said defendant, so using and exercising the trade of a — and so being such dealer and chapman, and a trader as aforesaid, according to the provisions of the said Act, afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, became and was indebted to one A. B. [*the petitioning creditor,*] a subject of this realm, in the sum of £100 and upwards, of lawful money of Great Britain, for a true and just debt, due and owing from the said defendant to the said A. B. [*the petitioning creditor.*]—And the said defendant being so indebted as aforesaid, and being a subject of this realm, and so using and exercising the trade and business of a — and so being such dealer and chapman, and a trader, according to the provisions of the said Act, afterwards, to wit, on the same day and year last aforesaid, at, &c. (*venue*) aforesaid, the said debt, to the said A. B. being then and there due and unpaid and unsatisfied, became and was a bankrupt, within the true intent and meaning of the said Statute, then and still in force concerning bankrupts made and provided; and that thereupon the said debt to the said A. B. still continuing then and there due and unpaid and unsatisfied, afterwards, to wit, on the [7th] day of [November,] A. D. [1830,] at, &c. (*venue*) aforesaid, a certain commission of bankruptcy, under the great seal of the United Kingdom of Great Britain and Ireland (r), bearing date at Westminster, a certain day and year therein mentioned, to wit, the same day and year last aforesaid, grounded upon the said Statute, upon the petition of the said A. B. was duly awarded and issued (s) against the said defendant, directed to certain commissioners therein named, to wit, [*name the commissioners*] by which said commission our lord the king did name, assign, appoint, constitute and

Bankruptcy of defendant, where the certificate was obtained after commencement of suit (o).

Defendant a trader.

Petitioning creditor's debt.

Act of bankruptcy.

Commission issued (q).

[\*914]

(a) Some day in the Term after the certificate was allowed.

(o) See the notes to the last precedent, and the form, 7 Went 414, and post, 916 to 919. Now to reply to this, see 3 Taunt. 237.

(p) As to this allegation, see 6 East, 413.—4 East, 502—9 East, 82.—Ante, 906. It does

not seem necessary.

(q) Examine with the commission.

(r) See 1 Taunt. 71.

(s) An allegation that it issued out of the Court of Chancery would be incorrect 3 Camp. 58.

BANK-  
RUPTCY.

Defendant  
found a  
bankrupt.

Notice in  
the Ga-  
zette.

ordain them the said — his special commissioners thereby giving full power and authority to the said — four or three of them, to proceed according to the said Statute, and take such order and direction with the body of the said defendant, such bankrupt, as also with all his lands, tenements, and hereditaments, both within this realm and abroad, as well copy or customary-hold as freehold, which he had in his own right before he became bankrupt, as also with all such interest in any such lands, tenements, and hereditaments, as the said defendant, such bankrupt, might lawfully depart with, all his money, fees, offices, annuities, goods, chattels, wares, merchandizes and debts, wheresoever they might be found or known, and to make sale thereof, or otherwise order the same, for satisfaction and payment of the creditors of the said defendant, such bankrupt; and to do and execute all and every thing and things whatsoever, towards and for all other intents and purposes, according to the ordinance and provision of the said Statute, thereby willing and commanding the said commissioners, four or three of them, to proceed to the execution and accomplishment of that his commission, according to the true intent and meaning of the said Statute, with all diligence and effect, as in and by the commission, relation being thereunto had will more fully appear.—By virtue of which said commission; and by force of the said Statute concerning bankrupts, the said, [*name the commissioners who adjudged the defendant a bankrupt*] the major part of the said commissioners named in the said commission, having severally and respectively duly taken the oath prescribed and appointed to be taken by commissioners of bankrupts, according to the form of the said Statute, and having then and there entered and [ \*915 ] kept a memorial thereof, signed by them \*respectively, among the proceedings in the said commission, afterwards, to wit, on the [10th] day of [November,] A. D. [1880,] at, &c. (*venue*) aforesaid, did, in due form of law, find that the said defendant, since the [1st] day of [September, 1825,] had become a bankrupt, within the true intent and meaning of the said Statute, and before the date and issuing forth of the said commission, and did then and there adjudge him to be a bankrupt accordingly. And the said defendant further saith, that afterwards, to wit on the said [10th] day of November, [1880,] aforesaid, at, &c. (*venue*) aforesaid, the said, [*name the commissioners,*] the major part of the said commissioners authorized by the said commission, pursuant to the directions of the said Act, did cause due notice to be given and published in the London Gazette, of such commission being issued, and of the said defendant having been so adjudged to be such bankrupt as aforesaid, of the times and place of three several meetings of the said commissioners, by the commission authorized within forty-two days next after such notice, (the last of which meetings was appointed to be held on the forty-second day), to wit, on the days and times and at the place therein mentioned, that is to say, on the — day of — then instant, on the — day of — then next, at — of the clock in the afternoon on each of the said days, and on the — day of — then next, at — o'clock in the — noon, at [the Court of Commissioners of Bankrupt, in Basinghall Street, in the city of London,] at which three meetings the said defendant, the bankrupt, was thereby required to surrender himself to the said commissioners named in the said commission, or the major part of them, and to make a full discovery and disclosure of his estate and effects; and at the last meeting the said de-

defendant, the bankrupt, was required to finish his examination. And the said defendant further saith, that the several meetings were duly appointed for his surrendering himself, and making a full disclosure and discovery of his estate and effects, and finishing his examination under the said commission, according to the form of the said Statute in that case made and provided.—And that the said defendant duly surrendered himself to the major part of the said commissioners, in and by the said commission named and authorized, and duly signed and subscribed such surrender, and submitted himself to be from time to time examined, touching the disclosure and discovery of his estate and effects, and at the last of the said meetings, to wit, on the — day of — A. D.—, until which day the last of the said meetings had been duly adjourned, at, &c. (*venue*) aforesaid finished his examination upon oath, before the said [name the major part of the commissioners] the major part of the said commissioners, if another commissioner be then present who has not before been stated to have taken the oath, &c. insert the following averment:—the said G. H. having then duly taken the oath prescribed and appointed to be taken by commissioners of bankrupts, according to the form of the said Statute, and having also entered and kept a memorial signed by him. And the said defendant, upon such his examination, then and there, made a full disclosure and discovery of his estate and effects.—And the said defendant further saith, that he hath always, from the time of the issuing forth of the said commission, hitherto, to wit, at &c. (*venue*) aforesaid, in all things conformed himself to the said Statute concerning bankrupts.—And the said defendant further saith, that he the said defendant having so duly surrendered, and in all things conformed himself to the said Statute at the time of the issuing of the said commission in force concerning bankrupts, afterwards, to wit, on the — day of —, and on divers other days and times afterwards, and before the — day of — (*the day of allowance*) at, &c. (*venue*) aforesaid, three-fifths (*t*) in number and value of the creditors of the said defendant, so being such bankrupt as aforesaid, who were creditors for not less than [£20,] and who had duly proved their debts under the said commission, signed a certificate of the conformity of the said defendant, such bankrupt as aforesaid, with the said Statute, at the time of the issuing of the said commission in force concerning bankrupts, and such three-fifths (*t*) of the said creditors then and there thereby testified their consent that the major part of the said commissioners by the said commission authorized, might sign and seal the said certificate as hereafter mentioned, and that the said defendant, such bankrupt as aforesaid, should have such allowance and benefit as are given to bankrupts by the said statute, and should be discharged from his debts in pursuance of the same act.—And the said defendant further saith, that the said [major part of the commissioners,] being the major part of the said commissioners, authorized by the said commission, afterwards, and after the expiration of six calendar months from the last examination as aforesaid, of the said defendant as such bankrupt as aforesaid, to wit, on the day and year last aforesaid, at &c. (*venue*) aforesaid, by their certain certifi-

BANK-  
RUPTCY.Defend-  
ant's sur-  
render.Defendant  
finishes his  
examina-  
tion.Defend-  
ant's con-  
formity.Defend-  
ant's cer-  
tificate.Approba-  
tion of  
certificate  
by the  
commis-  
sioners.

(t) Let this agree with the fact, see the statute.

BANK-  
RUPTCY.

ate, being the said certificate signed by the said three-fifths (u) of the said creditors as aforesaid, in writing under their hands and seals, did certify to the then Right Honourable the [then] Lord High Chancellor of Great Britain, amongst other things, that the said defendant, upon his said examination, made a full disclosure and discovery of his estate and effects, and in all things conformed himself to the said Act, and that there did not appear to them any reason to doubt the fullness of such discovery, and also that the creditors whose names or marks were subscribed to that certificate (being the certificate signed by the said three-fifths of the said creditors as aforesaid) were full three-fifths in number and value of the creditors of the said defendant, such bankrupt as aforesaid, who had proved their debts under the said commission to the amount of £20 or upwards, and that it did not appear to them the said last-mentioned commissioners, by due proof by affidavit in writing, that such several subscribing creditors, or some person by them respectively and duly authorized thereunto, and before them the said last-mentioned commissioners signing thereof, did sign that certificate, and testify their consent to them the said commissioners signing the same, and to the said defendant, such bankrupt as aforesaid, having such allowance and benefit as by the said Act were allowed to bankrupts, to the said defendant, such bankrupts as aforesaid, so being discharged from his debts in pursuance of the same Act. And the said defendant in fact further saith, that the said certificate having been so signed and sealed and allowed as aforesaid, afterwards, and before the pleading of this plea, to wit, on the [29th] day of [November] A. D. [1880] aforesaid, at, &c. (venue) aforesaid, was in due manner laid before the [then] Lord High Chancellor of Great Britain, for the allowing and confirming the same; and the said defendant then and there made oath in writing that such certificate and consent of the creditors were obtained without fraud; and such certificate was thereupon then and there in due form of law allowed and confirmed by the said Lord High Chancellor, according to the form of the Statute in such case made and provided.—And the said defendant further saith, that the said several causes of action in the said declaration mentioned accrued, and each and every of them did accrue to the said plaintiff before the said defendant so became a bankrupt as aforesaid, to wit, at, &c. (venue) aforesaid; and this the said defendant is ready to verify, wherefore he prays judgment if the said plaintiff ought further (w) to maintain his aforesaid action thereof against the said defendant, &c.

Allowance  
by Lord  
Chancellor.

[\*916]

Cause of  
action ac-  
crued be-  
fore bank-  
ruptcy.

Bankruptcy  
under 6  
Geo. 4, c.  
16, s. 52,  
that before  
the issuing  
of the com-  
mission plain-  
tiff had ac-  
cepted an  
accommo-  
dation bill  
drawn by  
defendant.

[First plea, general issue; second plea, bankruptcy generally, as ante, 911; and third plea, of bankruptcy specially, as ante, 913 to the end of the allowance of the certificate, and then proceed as follows:—And the said defendant further saith, that before the issuing the said commission of bankruptcy, and also before the said defendant had committed any act of bankruptcy, the said plaintiffs had become and were liable for certain debts of the said defendant, upon and by reason of the said several bills of exchange in the said first count mentioned, and which said several bills of exchange had been and were before then respectively drawn by the said

(u) According to the facts.

(w) This is necessary, 6 T. R. 697.

defendant, and accepted by the said plaintiff for the accommodation of the said defendant, and had been and were before then respectively negotiated by the said defendant, and at the time of the issuing of the said commission respectively were and remained in the hands of the divers persons, being respectively creditors of the said defendant, to wit, at, &c. (*venue*) aforesaid. And the said defendant further saith, that afterwards, and before any dividend had been made under the said commission, to wit, on, &c. [*day of proof of debts or about it*] at, &c. aforesaid, the said several debts had been and were respectively proved, under the said commission, by the respective holders of the several bills of exchange, being creditors of the said defendant as aforesaid, and that they the said plaintiffs, so being liable as aforesaid, \*after the issuing of the said commission, and after the said debts had been respectively proved as aforesaid, to wit, on, &c. at, &c. paid the said several debts, for which they were so liable as aforesaid, to the respective holders of the said several bills of exchange, so being creditors of the said defendant as aforesaid. And the said defendant further saith, that the said creditors who had not proved their debts under the said commission, could and yet may receive, under the said commission, a dividend, equally in proportion to their respective debts, without disturbing any dividends already made under the same commission, to wit, at, &c. aforesaid; and this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

BANK-  
RUPTCY.

and that  
afterward  
and before  
dividend,  
the holder  
had proved  
under  
defend-  
ant's com-  
mission,  
and that  
plaintiff  
the accept-  
or, after-  
wards  
paid, and  
could have  
benefit of  
proof (x)

[ \*917 ]

[*First plea general issue, ante, 908; second plea, of bankruptcy generally 911; third plea, as follows:*—And for a further plea in this behalf, as to the sum of £—, parcel of the said several sums of money in the said declaration mentioned, the said defendant, by like leave, &c. *actio non*, &c. (*as ante, 906*), because he saith, that after the making of the said several promises and undertakings, in the said declaration mentioned, as to the said sum of £—, parcel, &c. and before the exhibiting of the bill aforesaid, to wit, on, &c. at, &c. aforesaid, the said defendant then and there being a (warehouseman) dealer and chapman, and being then and there indebted to one J. S. and divers other persons, in divers large sums of money, became and was a bankrupt within the true intent and meaning of the Statute in force concerning bankrupts; and thereupon afterwards, to wit, on, &c. at, &c. aforesaid, a certain commission of bankruptcy, under the great seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster the same day and year last aforesaid, and grounded \*upon the said Statute, upon the petition of the said J. S. was duly awarded and issued against the said defendant, directed to certain commissioners therein named, to wit, G. W., &c. thereby giving full power and authority to the said commissioners, any four or three of them, to execute the said commission, as in and by the said commission, relation being thereunto had, will more fully appear; by virtue of which

Bankruptcy under 6  
Geo 4, c.  
16, s. 59,  
that plain-  
tiff proved  
the same  
debt under  
a commis-  
sion of  
bankrupt-  
cy, against  
defendant,  
and there-  
by elected  
to come in  
under the  
commission  
(y).

[ \*918 ]

(x) This defense may be given in evidence under the general plea of bankruptcy, ante, 911.—6 B. & A. 14.—12 East, 664; and as to this defense, see *id.* and cases there cited, 8 Taunt. 215.—2 Moore, 820.—5 B. & A. 862.

(y) This plea was framed by a very eminent Pleader at the bar. *Sed Quare*, if it may not be advisable to set forth the trading petitioning creditor's debt, and the commission, &c. more fully, as the precedent, ante, 911. See form, 5 B. & A. 95. It should

seem that this defense may be given in evidence under the general plea, ante, 911. And as to this defense, see 1 Bar. & Ald. 121.—1 Ross. B. C. 98.—8 Taunt. 649.—5 B. & A. *Quare*, if it can be pleaded, for *semble* the mere proof of the debt under the commission does not destroy the creditor's right of action; and if he afterwards proceed at law, the bankrupt should either apply to the Chancellor to expunge the debt, or to the court to stay proceedings.

BANK-  
RUPTCY.

said commission, and by force of the said Statute concerning bankrupts, the said G. W., &c. being the major part of the commissioners named in the said commission, afterwards, to wit, on, &c. at, &c. aforesaid, did, in due form of law, find that the said defendant had become a bankrupt within the true intent and meaning of the Statute in force concerning bankrupts, before the date and issuing forth of the said commission, and did then and there declare and adjudge him to be a bankrupt accordingly. And the said defendant further saith, that afterwards, and before the exhibiting of the bill aforesaid, to wit, on, &c. at, &c. aforesaid, the said plaintiff then and there being a creditor of the said defendant for the said sum of £— parcel, &c. under and by virtue of the said several promises and undertakings, in the said declaration mentioned, proved the said sum of £— parcel, &c. under the said commission, as for a debt due from the said defendant to the said plaintiff, and did thereby then and there make his election to take the benefit of the said commission, with respect to the said debt so proved by the said plaintiff as aforesaid, and this he the said defendant is ready to verify; wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof, against him, &c.

Plaintiff's  
bankruptcy  
pending  
the suit  
(z).

[ '919 ]

[ *First plea, general issue, as ante, 908; second plea, actio non ulterius, &c. as ante, 907.* ]—Because he says, that the said plaintiff, before and on the — day of — [ *same as special plea of bankruptcy of the defendant from the statement of his trading, ante, 913, to the finding and adjudging the plaintiff to be a bankrupt, as ante, 914 and then proceeds as "follows :* ] —And the said defendant further says, that afterwards, and before the exhibiting of the bill of the said plaintiff, to wit, on the — day of —, in the year aforesaid, the said plaintiff remaining and continuing a bankrupt, the said R. J. C., W. P. G., and W. C. three of the said commissioners named in the said commission, by certain indentures then and there made between the said R. J. C., W. P. G., and W. C. of the one part, and G. M. of —, in the county of —, (gardener), and P. E. of — street, (wine and brandy-merchant), of the other part, then and there being creditors of the said plaintiff, and sealed with the respective seals of the said R. J. C., W. P. G., and W. C. bargained, sold, assigned, and transferred to the said G. M. and P. E. amongst other things, the said sum of money, and cause of action in the said declaration mentioned, upon trust, nevertheless, to and for the use and benefit of the said G. M. and then said P. E. and all other the creditors of the said plaintiff who then had demanded, or who afterwards should in due time come in and demand relief by virtue of the said commission, and should contribute towards the expense of the same, according to the limitations of the aforesaid Statute. By virtue of which premises, and by force of the Statute in that case made and provided, the said G. M. and P. E. then and there became and were entitled to the said debts, sums of money, and causes of action, in the said declaration mentioned. And this he is ready to verify, wherefore he

(z) Though the bankruptcy of the plaintiff may be given in evidence in assumpsit, under the general issue, 7 T. R. 396. Bul. Nl. Pri. 158. 8 Campb. 236. 15 East, 622, yet it is frequently advisable to plead it specially, see

form 7 Went. 414. 15 East, 623; and it must be so, it should seem, if the bankruptcy took place after the commencement of the suit. All the proceedings should be set forth as ante, 918.



prays judgment if the said plaintiff ought *further* to have or maintain his aforesaid action thereof against him, &c.

BANK-  
RUPTCY.

[*First plea, non assumpsit, as ante*, 908; *second plea, actio non, as ante*, 906, *third form.*].—Because he saith, that heretofore, "to wit, on, &c. (*date of order*) to wit, at, &c. (*venue*) by a certain order made by the court for relief of insolvent debtors in England, held at (*the place where court held*) he the said defendant then being an insolvent debtor in custody, and a prisoner in the [King's Bench prison, or Fleet prison, or gaol of E., *according to the fact*] was duly discharged according to a certain act of parliament, made and passed in the 7th year of the reign of his late Majesty King George the Fourth, entitled, "An act to amend and consolidate the laws for the relief of insolvent debtors in England," [or, *if the discharge was under any other act, state it accordingly*] of and from the said several supposed promises and undertakings, and causes of action (if any) and each and every of them, in the said declaration mentioned; and that the said order and discharge still remains in full force, and this, &c.—[*Conclude with a verification, as ante*, 907, *sixth form.*]

INSOL-  
VENT.

Insolvent  
Debtor's  
Act, 7 G.  
4. c. 57(a).

[\*920]

[*\*First plea, general issue; second plea, actio non, as ante*, 906, *third form.*].—Because he saith, that after the said causes of action in the said declaration mentioned accrued, and also before the making of the said promissory note in the said declaration mentioned, and the delivery of the same to the said plaintiff, and before the exhibiting of the bill of the said plaintiff against the said defendant, (*or commencement of this suit*) he the said plaintiff was actually a prisoner in the custody of [the marshal of the Marshalsea of our lord the now king, *according to the fact,*] at the suit of one E. F. and others his creditors, within the meaning of a certain act made at the parliament of our lord the late King George the Fourth, holden at Westminster, in the county of Middlesex, in the 7th year of his reign intitled "An act to amend and consolidate the laws for the relief of insolvent debtors in England," and that afterwards, to wit, at the [general quarter sessions of the peace of our lord the king,] holden at [the sessions-house in Horsemonger-lane, in the parish of St. Mary, Newington, in and for the said county of Surrey, *according to the fact,*] the said plaintiff did subscribe his petition and applied to be discharged and exonerated under the said Statute as an insolvent debtor within the meaning of that act; and the said justices did, at such session, adjudge the said plaintiff to be entitled to the benefit of the said act, and did order the said [marshal of the

Plaintiff's  
discharge  
under an  
Insolvent  
Debtor's  
Act, 7  
Geo. 4. c.  
57 (b).

(a) See other forms of plea of insolvent acts, 3 Taunt. 237.—3 Went. Index, xix.—Id. 198. Wils. 199.—Morg. 241, 244, 246.—Lil. Ent. 198.—Lev. Ent. 65.—See a plea of defendants discharge as an Insolvent in Newfoundland, under 49 G. 3. c. 27, s. 8.—3 J. B. Moore, 623. 1 B. & B. 13, 294.—3 J. B. Moore, 244. The 7th Geo. 4, c. 57, s. 61, gives a general form of plea. The plea must show in what manner the defendant was discharged, unless the act under which he was discharged gives a general form, 8 East, 48.—Wils. 199. It must, it seems, be so pleaded specially, if the discharge was after issue joined, and see a form setting forth the proceedings specially, post, 1244, see 8 Price, 607.—If the discharge was after action but before issue joined, then it may, it seems, be pleaded generally in further bar

of the action, upon the same principles that a plea of bankruptcy is so pleadable, see ante, 911. Price, 607.—If the plaintiff agrees to abandon his debt, and requests defendant not to insert it in his schedule, defendant may give it in evidence under the general issue, and need not plead it specially, 3 J. B. Moore, 234. See form of replication to the above plea, post, 1149; see also as to replication, 3 Taunt. 237.

(b) It should seem that the discharge of the plaintiff, under an insolvent act, may be given in evidence under the general issue, 3 Camp. 236.—7 T. R. 898. Bul. Ni. Pri. 158.—15 East, 622. If, however, the discharge was after action brought, it should be pleaded specially, setting forth the proceedings. See the form, post, 1244.

INROL-  
VENCY.

Marshalsea of our said lord the king,] to set at liberty the said plaintiff; and the said defendant further says, that by force of the said Statute, all the estate, right, title, interest, and trust of the said plaintiff, of, in, and unto the said supposed debts and causes of action in the said declaration mentioned, and all the real, as well freehold and copyhold as customary, and all the personal estate, debts, and effects of the said plaintiff, were immediately after such adjudication thereby vested in G. H. Esq. then being clerk of the peace of and for the county of [Surrey,] where the said plaintiff was discharged, upon the trusts and for the purposes in the said act mentioned, to wit, at, &c. (*venue*) aforesaid; and this, &c.—[*Conclude with a verification, as ante, 807, sixth form.*]

[ \*922 ] \*In the King's Bench (C. P. or Exchequer.)

TENDER,  
&c.

Non-assump-  
sit, except as  
to the sum  
tendered  
(d).

Tender of  
that sum.

C. D. } — (c) *Term*, 1 *Will.* 4.  
ats. } And the said defendant by E. F. his attorney, comes and de-  
A. B. } fends the wrong and injury, when, &c. and also all the said sev-  
eral supposed promises and undertakings in the said declaration mentioned,  
except as to the sum of £— (e), parcel of the said several sums of money,  
in the said declaration mentioned, [or, if some of the counts are denied  
altogether, or a tender cannot be pleaded thereto, say, “in the said third,  
fourth, and last counts mentioned,”] says that he did not undertake or  
promise in manner and form as the said plaintiff hath above thereof com-  
plained against him, and of this he puts himself upon the country, &c.  
And as to the said sum of £— parcel of the said several sums of money  
in the said declaration, [or, in the said third, fourth, and last counts, ac-  
cording to the counts pleaded to] mentioned, the said defendant says, that  
the said plaintiff ought not to have or maintain his aforesaid action thereof  
against him, to recover any more or greater damages than the said sum  
of £— parcel, &c. (f) in this behalf, because he says, that after the mak-  
ing of the said several supposed promises and undertakings in the said de-  
claration mentioned, [or, “in the said — counts mentioned,” as to the  
said sum of £— parcel, &c. and before the exhibiting of the bill (g) of the  
said plaintiff against the said defendant in this behalf, for, if in C. P. or by  
original, “and before the commencement of this suit,”] to wit, on, &c. (h).

(c) This may be the term of which the plea is pleaded, though subsequent to the declaration, 1 Burr. 59.—1 Hen. Bla. 369. Dyer, 800 See also 2 Saund. 2, note 2. However, in Tidd, 9th edit. 468, it is laid down, that to avoid the inconsistency in the statement of an imparlance (by which it would appear that the defendant was not at all times necessary to pay) and then pleading a tender, that though the plea of tender may be pleaded after a general imparlance, yet it should be entitled of the same term as the declaration.

(d) See forms, Pl. A. 265, 269, 448, 452. A defendant cannot plead non-assumpsit to the whole, and a tender as to part, but must qualify the general issue, and his other pleas as above, admitting the liability as to the sum tendered, 4 T. R. 194. See observation in 1 Camp. 184, in note. No other plea can be pleaded to the sum alleged to have been tendered. 3 Wils. 145.—2 Bla. Rep. 723. A tender always admits the cause of action, as stated in the decla-

ration; it only goes in bar of damages, per Burrough, J. in 7 Taunt. 487, and see 3 Taunt. 95.—Tidd's Prac. 676. As to what is a sufficient tender, see 3 Chit. Com. Law, 186, Chit. jun. Contr. 302 to 310. 8 C. & P. 453.—3 Bingh. 304. 2 C. & P. 77, 50. As to costs on this plea, see Tidd's Prac. 9th edit. 971.

(e) The sum tendered, see ante, 921, n. d. Proof of the tender of a larger sum supports the allegation of the tender of the less. R. Walker Ford's MSS. 404.—8 Star. Evi 1559.

(f) The “&c.” is sufficient after the exception is once fully stated.

(g) In K. B. it is advisable to say “before the exhibiting of the bill,” rather than “the commencement of the suit,” in order to compel the plaintiff in some cases to reply a latitat, 1 Wils. 141. See Sell. Prac. 1st edit. vol. ii. Appendix, G. as to the term “ante exhibitionem billa.”

(h) The precise day of the tender is not in general material, but if the tender were after

at, &c. aforesaid, he the said defendant was ready and willing, and then and there tendered and offered (i) to pay to the said plaintiff the said sum of £— parcel, &c. to receive which of the said defendant he the said plaintiff then and there wholly refused; and the said defendant in fact further saith, that he the said defendant "always (k) from the time of the making of the said several promises and undertakings in the said declaration mentioned, [or, "in the said — counts mentioned,"] as to the said sum of £— parcel, &c. hitherto, at, &c. aforesaid, been ready to pay, and still is there ready to pay to the said plaintiff the said sum of £— parcel, &c. (and he now brings the same into court here ready to be paid to the said plaintiff if he will accept the same,) [or, *if the money has been already paid into court, instead of the word between brackets, the form should be thus,* "and the said defendant avers that he the said defendant hath paid the said sum of £— into the court of our said lord the king before the king himself, in this action so depending as aforesaid, ready to be paid to the said plaintiff, if he will accept the same"] and this he the said defendant is ready to verify, wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action against him to recover any more or greater damages than the said sum of £— parcel, &c. in this behalf, &c. (l). And for a further plea in this behalf, as to all the said several supposed promises and undertakings in the said declaration mentioned, [or, "in the said — counts mentioned,"] except as to the said sum of £— parcel, &c. the said defendant by leave of the court here for this purpose first had and obtained, according to the form of the Statute in such case made and provided, says, that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that the said plaintiff, before and at the time of exhibiting the bill of the said plaintiff against the said defendant in this behalf [or, *if in C. P. or by original,* "before and at the time of the commencement of this suit,"] to wit, at, &c. (venue) aforesaid, was, and from thence hitherto hath been, and still is, indebted to the said defendant in a large sum of money, to wit, the sum of £— of lawful money of Great Britain, for, &c. [here state the "subject-matter of the set-off as post, 934, 938, 9, and then proceed as follows:"] which said sums of money so due and owing from the said plaintiff to the said defendant exceeds the damages sustained by the said plaintiff by reason of the non-performance by the said defendant of the said several supposed promises and undertakings in the said declaration mentioned, [or, "in the said — counts mentioned,"] except as to the said sum of £— parcel, &c. and out of which said sum of money so due and owing from the said plaintiff to the said defendant, he the said defendant is ready and willing, and hereby offers to set off and allow to the said plaintiff the full amount of the said damages, except as aforesaid, according to the form of the Statute in such case made and provided, [if money

TENDER,  
&c.

[\*923]

Plea of set-off to the sum not tendered (m).

[\*924]

the first day of the Term, and the declaration intimated generally, the defendant should compel the plaintiff to entitle it specially, see Tidd's Prac. 9th edit. 463, or plead more specially.

(i) This is necessary, 2 Wils. 74.—10 East, 101.

(k) This is necessary, 1 Saund. 83, note 2.—1 Ld. Raym. 254.—8 East, 168.

(l) As to the conclusion, see 2 Salk. 622.—1 Ld. Raym. 254. S. C.—Willems, 13.

(m) See form, 2 Rich. C. P. 25, 26, 29. A plea of set-off is here given, because it is frequently pleaded with a plea of tender, in which case it varies in point of form in some trifling respects, from the usual plea of set-off. A notice of set-off cannot be given with a plea of tender. The set-off must be pleaded in that or any other case where another plea is pleaded besides the general issue, see Ry. & Mo. C. N. P. 143.—*Sed vide* 6 Esp. 50.

TENDER,  
&c.

*has been paid into court, state averment to that effect, as ante, 928.]* And this he the said defendant is ready to verify, wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, except as to the said sum of £— parcel, &c.

ACCORD  
AND  
SATISFAC-  
TION.

Accord  
and satis-  
faction by  
delivery of  
a pipe of  
wine (n).

[ \*925 ]

*Actio non, as ante, 906, first form, to the asterisk.]*—Because he says, that after the making of the said several promises and undertakings in the said declaration mentioned, and before the exhibiting of the bill of the said plaintiff against him the said defendant in this behalf [or, *if by original, or in C. P.* “before the commencement of this suit,”] to wit, on, &c. at, &c. (*venue*) aforesaid, he the said defendant delivered to the said plaintiff [one pipe of wine,] of great value, to wit, of the value of [£100] (o), in full satisfaction and discharge of the said several promises and undertakings, and of all the said sums of money in the said declaration mentioned, and which said [pipe of wine,] he the said plaintiff then and there accepted and received (p) of and from the said defendant in full satisfaction and discharge of the said several promises and undertakings, and of all the sums of money in the said declaration mentioned (q). And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

The like of  
a bond  
given in  
satisfac-  
tion.

[*Actio non, as ante, 906, first form, to the asterisk.*—Because he says, that after the making of the said several promises and undertakings in the said declaration mentioned, and before the exhibiting of the bill of the said plaintiff, against him the said defendant in this behalf, [or, *if by original, or in C. P.* “before the commencement of this suit,”] to wit, on, &c. (*date of bond*) at, &c. (*venue*) aforesaid he the said defendant made and sealed, and as his act and deed delivered to the said plaintiff, his the said defendant's, certain writing obligatory, in the penal sum of [£1000,] of lawful money of Great Britain, conditioned for the payment of [£500,] of like lawful money, and interest for the same, by the said defendant, to the said plaintiff, at a certain time therein mentioned, and now elapsed and which said writing obligatory the said defendant then and there delivered to the said plaintiff; and the said plaintiff then and there accepted and received the same of and from the said defendant, in full satisfaction and discharge of the said several promises and undertakings in the said declaration mentioned, and of all damages and sums of money thereupon due and owing, or accrued (r). And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

[ \*926 ]

Account  
stated and

\*[*First plea, non-assumpsit, as ante, 908; second plea, as follows.*—And for a further plea in this behalf, as to the sum of £— (*the sum for which the note was given,*) parcel of the said several sums in the said de-

(n) See forms, *Morg.* 232.—*Pl. A.* 245.—*Lil. Ent.* 106, 120, 493. As to accord and satisfaction in general, see *Bac. Ab. tit. Accord and satisfaction.* *Com. Dig. tit. Accord.* Accord and satisfaction may be given in evidence under the general issue. 1 *Ld. Raym.* 566.—12 *Mod.* 376, *S. C.*—4 *Esp.* 181. According to 1 *B. & C.* 286.—2 *D. & R.* 661, *S. C.*—accord and satisfaction cannot be pleaded as a sham plea, but according to other cases in *D. & R.* 281, 81 *B. & C.* 1, *S. C.*—1 *M. & P.* 338, it may.

(o) *Quere* if not better than the statement as to the value be omitted; see form in *Stephens on Pleading*, 285, where it is omitted.

(p) This is a material allegation, 3 *East*, 256.—1 *Stra.* 578.

(q) If there be several counts in the declaration, and the plea, professing to answer the whole, states that the goods, &c. were delivered and accepted in satisfaction “of the cause of action.” it would be bad, 2 *Chit. Rep.* 303. If a writ was sued out, and the accord and satisfaction took place after that time, the plea should aver that the plaintiff accepted the thing in satisfaction of the costs and damages sustained by the non-performance of the promises, 5 *B. & A.* 886.—1 *D. & R.* 546, *S. C.* and see form in *trespass*, post, 1062.

(r) See *supra*, note (t).

declaration mentioned, the said defendant, by leave of the court, here for this purpose first had and obtained, according to the form of the Statute in such case made and provided, says, that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says, that after the making of the said promises and undertakings in the said declaration mentioned, and before the exhibiting of the bill of the said plaintiff, against the said defendant in this behalf [or, *if in C. P. or by original*, "before the commencement of this suit,"] to wit, on, &c. (*date of note*), at, &c. (*venue*) aforesaid, an account was had and stated, by and between the said plaintiff and the said defendant, of and concerning the said several sums of money in the said declaration mentioned, and upon that accounting he the said defendant was then and there found in arrear and indebted to the said plaintiff, in the said sum of £—*the amount of the note (t)*, for which said sum of £— he the said defendant then and there made and delivered to the said plaintiff, his certain promissory note in writing, bearing date a certain day and year therein mentioned, to wit, the day and year last aforesaid, whereby he the said defendant promised to pay to the said plaintiff, or his order, [two] months after the date thereof, the said sum of £— wherein he the said defendant was so found in arrear and indebted to the said plaintiff as aforesaid, and the said plaintiff then and there accepted and received the said note for and on account of the said sum of £— parcel of the said sums of money in the declaration mentioned (1), and by reason thereof he the said defendant then and there became and still is liable to pay the said sum of £— in the said promissory note mentioned, according to the tenor and effect of the said note. And this, &c.— [Conclude with a verification, as ante, 907, sixth form.]

ACCORD  
AND  
SATISFAC-  
TION.

delivery  
and ac-  
ceptance  
of defend-  
ant's pro-  
missory  
note (s).

[Same as in the last preceding form, to the asterisk.]—For which that defendant accepted a bill of exchange payable to a third person (u).  
said sum of £— the said plaintiff afterwards, to wit, on, &c. (*date of bill*) at, &c. (*venue*) aforesaid, according to the usage and custom of merchants, made his certain bill of exchange in writing, bearing date a certain day and year therein mentioned, to wit, the day and year last aforesaid, and thereby then and there required the said defendant [two] months after the date thereof, to pay to [E. F. or] his order, the sum of £— for value received, which said bill of exchange the said defendant afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, upon sight thereof accepted, according to the said usage and custom of merchants, and the Statute in such case made and provided,

(s) See form, Ld. Ent. 121. This plea is sustainable. 5 T. R. 513.—10 Mod. 37. *Acc.* 1 Ken. Rep. 250, 391.—1 Burr. 9, S. C. *Contra*, but in that case the note was not negotiable, not being payable to order. It has been generally adopted as a dilatory plea, particularly where the plaintiff has declared only on the common counts, and a note or bill has been given but not paid when due, so as to put the plaintiff to show in his replication that the note was not paid, &c.; and see such replication, post, 1158. In 1 M. & P. 643, the court on an affidavit of the falsity of such a plea, ordered it to be struck out un-

less defendant would consent to withdraw it and undertake to plead issuably, &c.

(t) In general the payment of a smaller sum cannot be pleaded as a satisfaction for a larger. Therefore the plea should be pleaded only to the amount of the sum in the note or bill, as in the above form, or else it should be averred that the defendant was not indebted to plaintiff in more than that sum; see 2 B. & Cres. 477.

(u) See form and law, Wightw. 33.—Co. Lit. 212 b.—5 T. R. 513. See note to the former precedent.

(1) As to the necessity of this allegation, see *Bird et al. v. Caritat*, 2 Johns. 342. Where the note has been delivered to a third person for the plaintiff, it must be averred that he was the agent of the plaintiff, *ibid*.

ACCORD  
AND  
SATISFACTION.

for and on the account of the said sum of £—parcel of the said several sums in the said declaration mentioned; and by reason thereof, and according to the said usage and custom of merchants, he the said defendant then and there became, and was and still is liable to pay to the said [E. F.] or his order, the said sum of money in the said bill of exchange specified, according to the tenor and effect of the said bill of exchange, and of his the said defendant's said acceptance thereof. And this, &c.—  
[Conclude with a verification, as ante, 907, sixth form.]

ARBITRATION.  
Arbitrament and award (w).  
[ "928 ]

[First plea, non assumpsit, as ante, 908; second plea actio non, as ante, 906, third form.]—Because he says that after the making of the said several promises and "undertakings in the said declaration mentioned, and before the day of exhibiting of the bill of the said plaintiff, against the said defendant in this behalf, [or, if in C. P. or by original, "before the commencement of this suit,"] to wit, on, (x) &c. (date of submission) at, &c. aforesaid, the said plaintiff and the said defendant submitted themselves [here state the mode of submission, which have been thus:] (that is to say) by two mutual bonds of arbitration, bearing date respectively, to wit, the day and year last aforesaid, to the arbitration of, and engaged in all things well and truly to stand to, obey, abide, perform, fulfil, and keep the award, order, arbitrament, final end and determination of E. F. and G. H. arbitrators, indifferently elected and named, as well on the part and behalf of the said plaintiff as of the said defendant, to arbitrate, award, order, judge, and determine of and concerning all and all manner of action and actions, cause and causes of action, suits, bills, bonds, specialties, judgments, executions, extents, quarrels, controversies, trespasses, damages, and demands whatsoever, at any time theretofore had, made, moved, brought, commenced, sued, prosecuted, done, suffered, committed, or depending by and between the said parties, or either of them, so as the said award should be made by the said arbitrators, under their hands, and ready to be delivered to the parties in difference, or such of them as should desire the same on or before, &c. then next; which time for making the said award was afterwards, and before the time for making the same expired, to wit, on, &c. (day of first enlargement) at, &c. (venue) aforesaid, by consent of the said plaintiff and the said defendant, enlarged until, &c. then next, and it was then and there agreed by and between the said plaintiff and the said defendant, that the award made before that time between them should be binding and conclusive between them; which last-mentioned

Time enlarged (y).

Time further enlarged (z).

(w) As to this plea in general, see Com. Dig. Accord. D. Ba. Ab. Arbitrament, G. Arbitrament and award may be given in evidence under the general issue, non assumpsit; but it is frequently advisable to plead it, in order to compel the plaintiff in his replication to take issue on some particular part of the plea, and thereby admit the residue, see the forms, 3 Wentw. Index, 8.—Morg. Prec. 235, 237, 508.—Lutw. 52.—Clift. Ent. 495.—Kyd on Awards, 2d edit. 465.—Watson on Awards, 148.—Where, during the progress of a cause, an award had been made, in pursuance of a reference of the cause, but notwithstanding the plaintiff carried the cause down to trial, *Ld. Kenyon* is reported to have doubted whether he should receive the award in evidence or whether the defendant should not have pleaded in a plea, *puis darrein continuance*.

2 Esp. N. P. C. 504; and see 2 J. B. Moore, 30.—8 Taunt. 146, S. C. In covenant, debt on bond or trespass, it should be pleaded specially. Most of the precedents state the defendant's performance of the award; but this is unnecessary, if, as usual, the parties have mutual remedies against each other, to compel the performance of the matters awarded, but it is necessary, if there be no mutual remedies to compel such performance. 1 Young & Jervis, 19.—Kyd, 390, 392.—1 *Ld. Raym.* 122, 1039.—*Carth.* 187.—Com. Dig. Accord, D. 2—*Caldwell*, 211. *Watson*, 149.

(x) This is necessary, see *Cro. Eliz.* 66.

(y) These averments of enlargement must agree with the fact, and if there was no enlargement, should, of course, be omitted.

(z) As to the averment of performance, see ante, 927, n.

ARBITRA-  
MENT.

time for making the said award was afterwards, and before the said enlarged time for making the said award had elapsed, to wit, on, &c. (*day of last enlargement*,) at, &c. (*venue*) aforesaid, by consent of the said plaintiff and the said defendant, further enlarged until, &c. then next, and was then and there agreed, between the said plaintiff and the said defendant, that the said award before that time made between them, should be binding and conclusive between them. And the said defendant further saith, that the said arbitrators, before the expiration of the said last-mentioned time limited for making their award, to wit, on, &c. (*date of award*,) at, &c. (*venue*) aforesaid, took upon themselves the burthen of the said arbitration, and having duly examined and considered the subject-matters in dispute between the said plaintiff and the said defendant, they the said arbitrators did make their award in writing under their hands, of and concerning the premises, and of and concerning the said promises and undertakings in the said declaration mentioned, and ready to be delivered to the said parties in difference, and did thereby then and there award that, &c. [*here set forth the award*] as by the said award bearing date, &c. reference being therunto had, will more fully appear. (z). And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

The award.

\*[*Actio non, as ante, 906, first form, to the asterisk.*].—Because he saith, [ \*929 ] that he the said plaintiff heretofore, to wit, in — Term, in the — year

JUDG-  
MENT RE-  
COVERED.

(e) See forms, 1 Rich. C. P. 205.—2 Rich. C. P. 19, 20.—Morg. 252, 8.—Lil. Ent. 168; see a form of judgment recovered by defendant by verdict in trespass, post, 1062, a form of judgment recovered in an inferior court in Wales.—3 B. & Cres. 235; a form of judgment recovered at St. Christopher's abroad. 4 B. & Cres. 625; and as to this plea in general, and replication thereto, See 1 Saund. 92, n.

A judgment recovered may be given in assumpsit, under the general issue. 2 Stra. 733.—1 Saund. 67.—2 Brig. 377. Lord Tenison, however, in a recent case, refused to admit evidence of a judgment recovered under the general issue, and gave it as his opinion that it ought to have been pleaded specially; and see his opinion also in 2 B. & Ald. 668. At all events it is best to plead it specially, for first, the judgment will not operate as an estoppel against the plaintiff, and he may notwithstanding bring forward evidence as to, and present to the jury the subject-matter of, the claim, in the same manner, as if no previous judgment had been given, although indeed, in most cases the judgment would raise a fair inference that the jury in the former action duly considered the claim. See 2 B. & Ald. 662.—2 Bingh. 377.—3 East, 365.—2 Cr. & P. 148. Besides this, by pleading the judgment specially, defendant is driven to take issue on a single point, and admit or deny the judgment, or deny that it was for the same causes of action; and see, as to a replication, denying that the causes were the same, 3 B. & Cres. 235.—6 T. R. 607.—2 Bla. Rep. 827.—4 T. R. 146.—2 Bingh. 377, and a form of replication, post, 1159; and a form of new assignment, post, 1218.

In pleading a foreign judgment, defendant must show it was conclusive. 4 B. & Cres.

625.

A judgment between the same parties, and upon the same cause of action is conclusive, and if the *cause* of action is the same, it is immaterial that the *form* of action is different. Thus, a judgment in debt is a bar to an action of assumpsit on the same contract. 4 Rep. 94 b. So a judgment in trover, is a bar to an action of assumpsit for the value of the same goods. 2 W. Black. 827; and see Com. Dig. Action, K. (5). If the party mistake his *form* of action, and fail on that account, the judgment therein would not be conclusive, Cro. Eliz. 668.—2 Saund. 47.—2 J. B. Moore, 157. Roscoe, Evidence, 80, 1.

If a judgment be recovered in a former action for want of a plea; &c. it will be considered that plaintiff brought such action and recovered for all the causes of action that might have been recovered in that form of action, and which he knew of at the time of bringing it. 3 B. & Cres. 235. So if a plaintiff, having several causes of action against a defendant, on the trial offers evidence on those cases and fails, he cannot bring another action for the causes on which he failed. 2 Bingh. 382. But if the plaintiff omitted altogether to give any evidence as to them, he may bring another action for them. 6 T. R. 607.—4 T. R. 146. A judgment is only evidence where it is directly upon the point in question, and is not evidence of any matter which came collaterally in question, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment. 20 How. St. Tr. 533.—1 Salk. 290.

As to the effect of a judgment as regards the parties to it, and privies and strangers, see 1 Stark. Evid. tit. "*Judgment*,"—1 Phil. Evid. 308.—Roscoe Evid. 79, 80.

Judgment recovered in K. B., C. P. or exchequer (c).

JUDG-  
MENT RE-  
COVERED.

of the reign of our said lord the king, in the court (b) of our said lord the king, [before the king himself, the same court then and still being holden at Westminster, in the county of Middlesex,] [or, if the plea be of a judgment recovered in the Common Pleas, say, "before Sir N— C— T— Knight, and his companions, his Majesty's Justices of the Bench at Westminster, in the county of Middlesex;" or, if in the Exchequer, say "before the Barons of his Majesty's court of Exchequer at Westminster, in the county of Middlesex," (c)] impleaded the said defendant in a certain plea of trespass on the case on promises to the damage of the said plaintiff (d) of £— for the not performing the very same identical promises and undertakings, and each and every of them in the said declaration mentioned; and such proceedings (e) were thereupon had in the said court in that plea, that afterwards, to wit, in that same — Term, the said plaintiff, by the consideration and judgment of the said court recovered in the said plea against the said defendant, £— for his damages which he had sustained, as well on occasion of the not performing the same identical promises and undertakings, in the said declaration "mentioned, as for his costs and charges by him about his suit in that behalf expended, whereof the said defendant was convicted; as by the record and proceedings thereof, still remaining in the said court of our said lord the king, before the king himself (f), [or, if in C. P. "of the Bench aforesaid," or, in the Exchequer, "of the Exchequer aforesaid,"] at Westminster aforesaid, more fully and at large appears (g): which said judgment still remains in full force and effect, not in the least reversed, satisfied, or made void, (h). And this, &c.—[Conclude with a verification by the record, as ante, 907, seventh form.] (1).

Plea of judgment of retraxit in former action for the same cause (i).

[*Actio non, as ante, 904, third form.*]—Because he says, that. heretofore, to wit, in — Term, in the year of our Lord — the said plaintiff impleaded the said defendant in the court of our said lord the king of the bench, [see ante, 929, if in K. B. or Exchequer] for the non-performance of the same identical promises and undertakings in the said declaration mentioned, and such proceedings were thereupon had in that court, that afterwards, to wit, in the said last-mentioned Term, the said plaintiff came into the said court, in his own proper person, and confessed that he would not further prosecute his said suit against the said defendant, but from the same altogether withdrew himself; therefore it was then and there considered by the said court, that the said plaintiff should take nothing by his said bill, but that he and his pledges to prosecute should be in mercy, &c.

When the plea is adopted as a sham plea or delay, the judgment is usually stated to have been recovered in a *different court* to that in which the plea is pleaded, for if the recovery were pleaded in the same court, the plaintiff might, instead of replying, craveoyer of the record, or at least a note in writing of the term and number roll, and sign judgment if it were not given in convenient time. Tidd's Prac. 9th edit. 644, 6.

When the plea is pleaded in fraud of a judge's order, plaintiff may sign judgment, 2 Chit. Rep. 292.—Tidd, 9th edit. 563.

(b) The plea must state the term, year, and court in which the judgment was recovered, 1 Saund. 829, note 1.

(c) See precedent and notes, ante, 482.

(d) Be accurate in stating the parties to the judgment.—4 Taunt. 18. If the defendant's instead of plaintiff's name, be inserted, it would be bad on general demurrer, 7 Taunt. 271. See Query this decision.

(e) 1 Saund. 92, n. 2.

(f) A material averment, 1 J. B. Moo. 19

(g) Willcs, 128.—Com. Dig. title "*Plead-*er," E. 29.

(h) 1 Saund. 380, n. 4.—1 Rich. C. P. 205

(i) This form will be found in the old Entries. It is questionable, however, whether a judgment of this kind is a bar to another action. It operates merely like a judgment of nonsuit; see Tidd, index, "*Retraxit.*"

(1) A plea of recovery against, and satisfaction from a third person, contains both matter of fact, and of record, and should conclude to the country. 6 Johns.



said that the said defendant should go thereof without day, as by the record and proceedings thereof still remaining in the said court more fully and at large appears, which said judgment still remains in full force and effect, not in the least reversed, satisfied, or made void, and this, &c.—  
[Conclude with a verification by the record, as ante, 907, seventh form.]

JUDGMENT  
RECOVERED.

[*Actio non*, as ante, 906, first form.]—Because he says, that after the making of the said several promises and undertakings in the said declaration mentioned, and before the exhibiting of the bill of the said plaintiff against the said defendant in this behalf, [or, if in *C. P.* or by original, "before the commencement of this suit,"] to wit, on, &c. (*l*) at, &c. (*venue*) aforesaid, the said plaintiff, by his certain writing of release, sealed with his seal, and now shown to the said court here, the date whereof is a certain day and year therein mentioned, to wit, the day and year last aforesaid, [or, if the release be pleaded as a sham plea, or if the deed have been lost, instead of the profert, say "which said writing of release having been lost and destroyed by accident, the said defendant cannot produce the same to the "said court here,"] did demise, release, and for ever quit claim unto the said defendant, his heirs, executors, and administrators, the said several promises and undertakings in the said declaration mentioned, and each and every of them, and all sum and sums of money then due and owing, or thereafter to become due, together with all and all manner of action and actions, cause and causes of action, suits, bills, bonds, writings obligatory, debts, dues, duties, reckonings, accounts, sum and sums of money, judgments, executions, extents, quarrels, controversies, trespasses, damages, and demands whatsoever, both at law and in equity, or otherwise howsoever, which he the said plaintiff then had, or which he should or might at any time or times thereafter have, claim, allege, or demand against the said defendant, for or by reason or means of any matter, cause, or thing whatsoever, from the beginning of the world to the day of the date of the said deed or writing of release (*m*); as by the said deed or writing of release, reference being thereunto had, will fully appear. And this, &c.—[Conclude with a verification, as ante, 907, sixth form.]

RELEASE.  
Release  
(*k*).

[ \*981 ]

[*First plea, general issue*, as ante, 908; *second plea, actio non*, as ante, 906.]—Because he says, that after the making of the several promises and undertakings in the said declaration mentioned, and before the exhibiting of the bill of the said plaintiffs against the said defendant in this behalf, to wit, on, &c. (*date of deed, or about it*) at, &c. (*venue*) aforesaid, That plaintiff signed a composition deed for the debt (*n*).

(*k*) See forms, 2 Rich. C. P. 70, 71.—Morg. 237. A release may be given in evidence under the general issue, or pleaded with it. 6th. C. P. 64.—Doug. 106, 107.—3 Esp. Rep. 234.—Ld. Raym. 566, 787.—12 Mod. 377.—3 Burr. 1358; Cases Pr. C. P. 154.—Barnes, 323, S. C. and in the case of a release contained in a composition deed by creditors to an insolvent, it is not usual to plead it, but it may be pleaded, and see the next form. A plea of release is sometimes adopted as a dilatory plea, and where a release has actually been executed in the usual form, it is frequently advisable to plead it, in order to narrow

the evidence on the trial. See forms of pleas of a release *pais darrein continuance*, post, 1238, 1241, 1242.

(*l*) The date of the release.

(*m*) In some cases it may be necessary to plead the release of the cause of action with more precision, and to omit the general release when those words do not accord with the facts.

(*n*) In assumpsit or debt on simple contract, this defense may be given in evidence under the general issue, ante, 430, n. but it may frequently be advisable to plead it, in order to narrow the evidence at the trial, and bring the question to a single issue.

**RELEASE.** said, an account was had and stated by and between the said plaintiffs and defendant, of and concerning the said several sums of money in the said declaration mentioned, and upon that accounting the said defendant was then and there found to be in arrear and indebted to the said plaintiffs in the sum of £—: and the said defendant further saith, that afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) by a certain deed then and there made by the said plaintiffs, and sealed with the respective seals of the said plaintiffs, they the said plaintiffs did covenant, promise, and agree, to and with the said defendant, his executors, administrators, and assigns, that [*here set forth the release, which may be thus :*] they the said plaintiffs should and would, and they did thereby accept the sum of — shillings in the pound, then and there paid by the said defendant to the said plaintiffs, in full satisfaction and discharge of the said sum of £— and that they the said plaintiffs should not nor would sue, arrest, implead, trouble, attach, or seize the said defendant, his heirs, executors, and administrators, estate or effects, for or on account of the said sum of £— or any part thereof; and the said defendant further saith, that divers other creditors of the said defendant did then and there also, in and by the said deed, agree to accept, and did then and there accept, the sum of £—currently with the said plaintiffs, for and in satisfaction of the several debts to such creditors respectively due and owing from the said defendant, and did also, in and by the said deed, covenant with the said defendant, not to sue the said defendant, for such respective debts. And this he the said defendant is ready to verify, wherefore, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

**SET-OFF.** [*First plea, general issue, as ante, 908.—And for further plea, action non, as ante, 906, 7, third form.*—Because he says, that the said plaintiff, before and at the time of the commencement of this suit (*p*), to wit, at, &c. (*venue*) aforesaid, was and still is indebted to the said defendant in a large sum of money, to wit, the sum of £— (*enough to cover the defendant's set-off.*—*It is usually the sum stated as damages at the conclusion of the declaration,*) of lawful money of Great Britain, for [*here state the subject matter of the set-off according to the fact, the usual allegations are as in the precedents, post, 934, &c. and when they do not apply, the set-off may be stated as in the counts in indebitatus assumpsit, ante, pages 89 to 91. The following is the common statement of a set-off for work and labor, goods sold, and money lent, paid, had, and received, interest, and account stated.*—For the work and labor, care, diligence, and attendance of the said defendant by the said defendant and his servants before that time done, performed, and bestowed, in and about the business of the said plaintiff, and for the said plaintiff, and at his request, and for divers materials and other necessary things by the said defendant before that time found and provided, and used and applied in and about the said work and labor for the said plaintiff, and at his like request, and for divers goods, wares, and merchandizes sold and delivered by the said defendant to the said plaintiff, and at his like request, and for money

**Work and labor and materials.**

**Goods sold.**

(e) See forms, 2 Rich. C. P. 24, 6.—Morg. 250, to an action by an executor, 2 Rich. C. P. 32 See a plea of set-off founded on an agreement where the debts were not due in the same right, or to the same parties, 2 Taunt. 170.—As to when a set-off may be

pleaded, see ante, vol. i. 484. As to when a notice, instead of a plea of set-off, should be used, see post, 932, n.

(p) These words are necessary, 3 T. R. 180.

by the said defendant before that time lent and advanced to, and paid, laid out, and expended for the said plaintiff, and at his like request, and for money by the said plaintiff before that time had and received, to and for the use of the said defendant, and for money due and owing from the said plaintiff to the said defendant, for interest upon, and for the forbearance of divers large sums of money due and owing from the said plaintiff to the said defendant, and by the said defendant foreborne to the said plaintiff, for divers long spaces of time before then elapsed, and for money due and owing from the said plaintiff to the said defendant upon an account stated between them.] Which said sum (or "sums") of money so due and owing to the said defendant as aforesaid, exceeds, (or "*exceed*") the damages sustained by the said plaintiff by reason of the non-performance by the said defendant, of the said several supposed promises and undertakings in the said declaration mentioned, and out of which said sum (or "sums") of money so due and owing from the said plaintiff to the said defendant, the said defendant is ready and willing, and hereby offers to set off and allow to the said plaintiff the full amount of the said damages, according to the form of the Statute in such case made and provided. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

SET-OFF.  
Monies lent, paid, and had and received.  
Interest.  
Account stated.  
[ \*932 ]  
Usual conclusion.

*In the King's Bench, (or "C. P." or "Exchequer.")*

— Term, 1 Will. 4.

C. D. } And the said defendant by E. F. his attorney, comes and defends the wrong and injury, when, &c. and say, that he did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against the said defendant, and of this the said defendant puts himself upon the country, &c.

General issue, and notice of set-off (q).  
[ \*933 ]

*In the King's Bench (or "C. P." or "Exchequer.")*

Between { A. B. Plaintiff,  
and  
C. D. Defendant.

The notice of set-off (r).

Mr. — (the plaintiff's attorney.)

Take notice, that the above-named defendant on trial of this cause will give in evidence, and insist that the above-named plaintiff, before and at the time of the commencement of this suit, was and still is indebted to the said defendant in the sum of £— of lawful money of Great-Britain, for [here state the subject-matter of the set-off, as in the following precedents, and precisely as in a plea of set-off, as directed ante, 932, and proceed as follows:] and that the said defendant will set off and allow to the said plaintiff on the said trial, so much of the said sum of £— so

(q) In order to save the expense of a rule to plead double, and the additional expense in the length of the paper book, it is in general more advisable to give notice of set-off than to plead it, except where the debt on either side accrues by reason of a penalty contained in any bond or specialty, in which case the set-off must be pleaded. 8 Geo. 2. c. 24. s. 4. —2 Geo 2 c. 22. s. 13. If any other plea be pleaded besides the general issue, then the de-

fendant must plead the set-off, and a notice will not avail him, Ry. & Mo. C. N. P. 418.

(r) See form, 5 Rich. C. P. 69. The Pleader in preparing the notice of set-off, subscribes it at the foot of the general issue; but the notice is a practical proceeding, and does not appear upon the record. The notice should, in point of form, be as certain as a declaration, Bul. Nil Pri. 179.

**SET-OFF.** due and owing from the said plaintiff to the said defendant, against any demand of the said plaintiff, to be proved on the said trial, as will be sufficient to satisfy and discharge such demand, according to the form of the Statute in such case made and provided. Dated this — day of —, A. D. —

Yours, &c.

E. F. Defendant's Attorney.

Plea of set-off to action by executors or administrators.

[*Actio non, as ante, 906, third form.*]—Because he says, that he the said E. F. (*the deceased*) before and at the time of his death, to wit, at, &c. (*venue*) aforesaid, was indebted to the said defendant in the sum of £— of lawful money of Great Britain, for [*here state the subject-matter of the set-off in which the deceased was indebted to defendant.*—*If plaintiffs were indebted to defendant in their representative character, the plea should be framed accordingly, and proceed thus:*—] which said sum of money, before and at the time of the commencement of this suit, was and still is due and owing from the said plaintiffs as executors (*or administrators*) as aforesaid, to the said defendant, and exceeds the damages sustained by the said plaintiffs as executors (*or administrators*) as aforesaid, by reason of the non-performance by the said defendant of the said several supposed promises and undertakings in the said declaration mentioned, and out of which said sum of money, so due, is due and owing to the said defendant, the said defendant is ready and willing, and hereby offers to set off and allow to the said plaintiffs as executors (*or administrators*) as aforesaid, the full amount of the said damages, according to the form of the Statute in such case made and provided. And this, &c.—[*Conclude with usual verification, as ante, 907, sixth form.*]

Notice of set-off in action by executors or administrators.

[*After the usual plea of the general issue non assumpsit, as ante, 908, add the following notice:*]

*In the King's Bench, (or "C. P." or "Exchequer.")*

Between	{	A. B. & C. D. executors of the last will and testament, ( <i>or administrators of the goods, chattels and effects</i> ) of E. F. deceased, - - - - - Plaintiffs, and G. H. - - - - - Defendant.
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Mr. I. J. (*the plaintiff's attorney.*)

Take notice, that the above-named defendant on the trial of this cause will give in evidence, and insist that the above named E. F. before and at the time of his death, was indebted to the said defendant in the sum of £— of lawful money of Great Britain [*here state the subject-matter of the set-off on which the deceased was indebted to defendant.*—*If anything became due from the plaintiffs in their representative character after the death, the plea should be framed accordingly, and proceed thus:*] Which said sum of money is still wholly due and unpaid to the said defendant, and the said plaintiffs, as executors (*or administrators*) as aforesaid, before and at the time of the commencement of this suit, were and still are indebted to the

said defendant in the amount thereof. And the said defendant will set off and allow to the said plaintiffs on the said trial so much of the said sum of money so due and owing to the said defendant as aforesaid, against any demand of the said plaintiffs, to be proved on the said trial, as will be sufficient to satisfy and discharge such demand, according to the form of the statute in such case made and provided. Dated this — day of — in the year of our Lord —.

Yours, &c.

K. L. Defendant's Attorney.

[*Actio non, as usual, as ante, 906, third form.*]—Because he says, Plea of set-off in action against executors or administrators. that he the said plaintiff, before and at the time of the death of the said E. F. to wit, at, &c. (*venue*) aforesaid, was indebted to the said E. F. in the sum of £— of lawful money of Great Britain, for [*here state the subject matter of the set off due to the deceased.*—*If anything was due after the death, the plea should be framed accordingly, and proceed thus:*]—Which said sum of money is still due and owing from the said plaintiff to the said defendants as executors (*or administrators*) as aforesaid, and exceeds the damages sustained by the said plaintiff, by reason of the non-performance of the said several supposed promises and undertakings in the said declaration mentioned, and out of which said sum of money so due and owing from the said plaintiff as aforesaid, the said defendants are ready and willing, and hereby offer to set-off and allow to the said plaintiff, the full amount of the said damages, according to the form of the Statute in such case made and provided. And this, &c.—[*Conclude with the usual verification, as ante, 907, sixth form.*]

[*After the usual plea of the general issue, as ante, 908, add the notice of set-off as follows:*]

In the King's Bench, (or "C. P." "*Exchequer.*")

Between

A. B. - - - - - Plaintiff,  
and  
C. D. and E. F. executors of the last will  
and testament (*or administrators of the estate*  
and effects) of E. F. deceased, Defendants.

Notice of set-off in action against executors or administrators.

Mr. G. H. (*the plaintiff's attorney.*)

Take notice, that the above-named defendants on the trial of this cause will give in evidence, and insist that the above-named plaintiff, before and at the time of the death of the said E. F. was indebted to the said E. F. in the sum of £— of lawful money of Great Britain, for [*here state the subject-matter of the debt due to the testator or intestate in his life-time, or if due to the defendants as executors after the death, the plea must be framed accordingly:*] Which said sum of money is still wholly due and unpaid, and the said plaintiff, before and at the time of the commencement of this suit, was and still is indebted to the said defendants as executors (*or administrators*) as aforesaid, in the amount thereof; and the said defendants will set off and allow to the said plaintiff on the said trial so much of the said sum of money so due and owing from the said plaintiff as

**SET-OFF.** aforesaid, against any demand of the said plaintiff, to be proved on the said trial, as will be sufficient to satisfy and discharge such demand, according to the form of the Statute in such case made and provided. Dated this — day of — in the year of our Lord —.

Yours, &c.

I. K. Defendant's Attorney.

Set-off in  
action by  
assignees  
of a bank-  
rupt (i).

[*Actio non as usual, as ante, 906, third form.*]—Because he says, that he the said E. E. (*the bankrupt*) before and at the time of his bankruptcy, to wit, at, &c. (*venue*) aforesaid, was, and from thence hitherto hath been, and still is, indebted to the said defendant in the sum of £— of lawful money of Great Britain, for [*here state the subject-matter of the debt due from the bankrupt, as usual and proceed thus:*] Which said sum of money, before and at the time of the commencement of this suit, was and still is due and owing to the said defendant as aforesaid, and exceeds the damages sustained by the said plaintiffs as assignees as aforesaid, by reason of the non-performance by the said defendant of the said several supposed promises and undertakings in the said declaration mentioned, and out of which said sum of money so due and owing to the said defendant as aforesaid, he the said defendant is ready and willing, and hereby offers to set off and allow to the said plaintiffs the full amount of the said damages, according to the form of the Statute in such case made and provided. And this, &c.—[*Conclude with usual verification, as ante, 907, sixth form.*]

Notice of  
set-off in  
action by  
assignees  
of a bank-  
rupt.

[*After the usual plea of the general issue, as ante, 908, add the following notice:*]

In the K. B. (or "C. P." or "Exchequer.")

Between	{	A. B. and C. D. assignees of the estate and effects of	Plaintiffs,
		E. F. a bankrupt, - - - - -	
		G. H. - - - - -	
		and	Defendant.

Mr. I. K. (*plaintiff's attorney.*)

Take notice that the above-named defendant on the trial of this cause will give in evidence and insist that the above-named E. F. before and at the time of his bankruptcy, was and still is indebted to the said defendant in the sum of £— of lawful money of Great Britain, for [*here state the subject-matter of the set-off due from the bankrupt, as usual, and proceed thus:*] And which said sum of money, before and at the time of the commencement of this suit, was and still is wholly due and unpaid to the defendant; and the said defendant will set off and allow to the said plaintiffs, on the said trial so much of the said sum of money so due and owing to the said defendant against any demand of the said plaintiff's, to be proved on the said trial as will be sufficient to satisfy and discharge such demand, ac-

(s) A plea or notice of set-off is not, in strictness, necessary in an action at the suit of assignees of a bankrupt, see the 6 Geo. 4, c. 16.

ording to the form of the Statute in such case made and provided. **SET-OFF.**  
 Dated this — day of — in the year of our Lord —.

Yours, &c.

K. L. Defendant's Attorney.

*[Commencement and conclusion of the plea or notice of set-off, as ante, 931, 933.]* — Upon and by virtue of a certain judgment which he the said defendant heretofore, to wit, in — Term, in the — year of the reign of our said lord the king, before the king himself, *[or, if in C. P. say* **Set-off on a judgment (t)** *before his Majesty's Justices of the Bench at Westminster, in the county of Middlesex,"]* recovered against the said plaintiff in a certain plea of trespass on the case upon promises, whereby it was considered and adjudged that the said defendant should recover against the said plaintiff the said sum of £—, for his damages which he had sustained, as well by reason of the not performing of certain promises and undertakings, before then made by the said plaintiff to the said defendant, as for his costs and charges by him about his suit in that behalf expended (u), whereof the said plaintiff was convicted, as by the record and proceedings thereof remaining in the said court of our said lord the king, before the king himself, *[or, in C. P. "in the said court of our lord the king of the Bench aforesaid,"]* more fully appears, which said judgment still remains in full force and effect, not reversed, annulled, discharged, satisfied, or made void, and which he the said defendant is ready to verify by the said record, *[if any further sum be due to defendant besides that on the judgment, here insert it.—It may be as well also here to state a set-off on the consideration for the judgment:]* Which said sum of money so due and owing from the said plaintiff to the said defendant as aforesaid exceeds the damages sustained by the said plaintiff by reason of the non-performance by the said defendant of the said several supposed promises and undertakings in the said declaration mentioned, and out of which said sum of money so due and owing from the said plaintiff to the said defendant, he the said defendant is ready and willing, and hereby offers to set-off and allow to the said plaintiff the full amount of the said damages, according to the form of the Statute in such case made and provided, and this he the said defendant is ready to verify, wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c. **[ \*935 ]**

*[Commencement and conclusion of plea or notice of set-off, as ante, 931,* **On a recognizance in another court, and on simple contract (u)**

(t) See the forms, 8 West. 160, 1. The record of the judgment must be referred to, but the plea is to conclude with a general verification, as in this precedent. In *Strudwick v. James*, M. 4 G. 4, a similar plea was demurred to specially, for concluding with a general verification. *Tindal* for plaintiff, *Chitty* for defendant; and after argument the court held the plea sufficient, it containing a verification by the record, and the question of fact whether more was due to the plaintiff than the debt on the judgment, might properly be tried by the country, the general concluding verification was sufficient on the part of the defendant; the following cases were cited, viz. a similar form in *Jaques v. Withby*, 1 T. R. 667, and 22 MSS. 260, 324. *Hob. 244.—Sav.*

208, 301.—3 Wentw. 161, and see 1 B. & A. 153. Defendant cannot set-off a judgment in which he has taken the plaintiff in execution, 5 M. & S. 103, and plaintiff may reply such taking. 2 Chit. Rep. 808.

(u) The judgment is to be described according to the fact, see the forms, ante, 482 to 498.

(w) *Quere*, whether if this be pleaded as a dilatory plea, the court may not be, with success, moved for leave to sign judgment, as it contains matter of record and simple contract, 2 M. & S. 606; and in 5 B. & A. 750.—*Ante*, vol. i. 449; where defendant pleaded this plea, the court allowed judgment to be signed. See replication to this plea, 1 B. & A. 154. *Post*.

**set-off.** 983.]—Upon and by virtue of certain recognizance, "he the said plaintiff having before the commencement of this suit, to wit, in — Term, in the — year of the reign of our said lord the king, come in his own proper person, into the court of our said lord the king, before the king himself, the said court then and still being holden at Westminster, in the county of Middlesex, [or, *if in the Common Pleas, see the form, ante, 475,*] and then and there in the said court acknowledged himself to owe to the said defendant the sum of £— of lawful money of Great Britain, to be paid to the said defendant when he the said plaintiff should be thereunto afterwards requested, which said sum of £— he the said plaintiff, for himself and his heirs, then and there consented and granted should be made of his and their lands, goods, and chattels, and should be levied to the use and behoof of the said defendant [or, *if in C. P. see the form, ante, 475,*] and which said recognizance is still in full force, strength and effect, not paid off, annulled, or satisfied; as by the said recognizance remaining of record in the said court of our said lord the king, before the king himself, will fully appear, and which he the said defendant is ready to verify by the said record (x). And the said defendant further saith, that the said plaintiff, at the time of the commencement of this suit, at, &c. (*venue*) aforesaid, was and still is indebted to the said defendant in the further sum of £— of like lawful money, for, &c.—[*Set-off on money counts, as ante, 932, and conclude the plea or notice of set-off, as ante, 931, 2.*]

On simple contract.

For rent due on a lease (y).

[*Commencement and conclusion of plea or notice of set-off, as ante, 931, 983.*]—Upon and by virtue of a certain indenture of lease, made heretofore, to wit, &c. (*date of lease*) at, &c. (*venue*) aforesaid, between the said defendant of one part, and the said plaintiff of the other part, (the counterpart of which said indenture, sealed with the seal of the said plaintiff the said defendant now brings here into court, the date whereof is the day and year last aforesaid,) whereby the said defendant demised certain premises and tenements, with the appurtenances therein mentioned, to the said plaintiff for a certain term of years therein mentioned, to wit, for the term of — years, from, &c. yielding and paying during the said term the yearly rent or sum of £— on certain days therein mentioned, to wit, on, &c. and in and by which said indenture he the said plaintiff covenanted with the said defendant to pay him the said rent of £— on the days aforesaid, of which said rent afterwards, to wit, on, &c. a large sum of money, to wit, the said sum of £— for — years of the said term then elapsed, became and was, and still is in arrear and unpaid from the said plaintiff to the said defendant, to wit, at, &c. (*venue*) aforesaid.—[*Insert also a set-off for use and occupation, as post, 938.*]

Set-off on a bond (z).

[*Commencement and conclusion of plea of set-off, as ante, 931, 983.*]—Upon and by virtue of a certain writing obligatory, made by the said

(x) If the recognizance be enrolled, it should be so stated, as a recognizance is not a record till enrolled, 1 Inst. 260. a. 1 B. & A. 158.

(y) If rent be due on a lease the set-off should not be for use and occupation, but as above. See Bul. Ni. Pri. 179. Tidd's Prac. 9th edit. 720. *sed query.*

(z) See the form, 1 Wils. 155.—5 T. R. 188. When the debt on either side accrues by reason of a penalty contained in any bond or specialty, the set-off must be pleaded, and the sum really due must be stated in the plea, 8 Geo. 2. c. 24, s. 4.—2 Geo. 2. c. 12. s. 23.—8 T. R. 65.—6 T. R. 460.



plaintiff heretofore, to wit, on, &c. (*date of bond*) at, &c. (*venue*) aforesaid, and sealed with his seal, and now shown to the court of our said lord the king, before the king himself, [or, in *C. P.* "to his Majesty's Justices here,"] the date whereof is, to wit, the same day and year last aforesaid, whereby he the said plaintiff became held and firmly bound unto the said defendant in the penal sum of £— of like lawful money, to be paid to the said defendant when he the said plaintiff should be thereunto afterwards requested, which said writing obligatory was and is conditioned for the payment of a certain sum of money, to wit, the sum of £— at a certain time therein mentioned, and which had elapsed before the commencement of this suit, and which said writing obligatory at the time of the commencement of this suit was and still is in full force and effect, not released, paid off, satisfied, cancelled, or otherwise made void, and at the time of the commencement of this suit there was and still is due and owing from the said plaintiff to the said defendant upon the said writing obligatory, by the condition thereof, a certain sum of money, to wit, the sum of £— [ \*987 ] (*the sum first alleged to be due*) to wit, at, &c. (*venue*) aforesaid.

[*Commencement and conclusion of plea, or notice of set-off, as ante, 931 to 933.*]—Upon and by virtue of a certain bill of exchange, bearing date, to wit, the — day of — A. D. — heretofore, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, made and drawn by the said defendant upon, and then and there accepted by the said plaintiff, whereby he the said defendant requested the said plaintiff [two] months after the date thereof, to pay to him the said defendant, or his order, the sum of £—. On a bill accepted by plaintiff.

[*Commencement and conclusion of plea, or notice of set-off, as ante, 931 to 933.*]—And also in the further sum of £— of like lawful money, upon and by virtue of a certain other bill of exchange, bearing date, to wit, the — day of — A. D. — heretofore, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, made and drawn by the said plaintiff upon one E. F. whereby he the said plaintiff requested the said E. F. two months after the date thereof, to pay to the said plaintiff or his order, the sum of £— for value received, which said bill of exchange the said plaintiff afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, indorsed and delivered to the said defendant, and which said bill of exchange, when the same became "due and payable, according to the tenor and effect thereof, to wit, on, &c. (*day it fell due*) at, &c. (*venue*) aforesaid, was presented and shown to the said E. F. for payment thereof, but the said E. F. then and there neglected and refused to pay the said sum of money in the said bill of exchange specified, whereof the said plaintiff afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, had notice. On a bill indorsed by plaintiff to defendant. [ \*988 ]

[*Commencement and conclusion of plea, or notice of set-off, as ante, 931 to 933.*]—And also in the further sum of £— of like lawful money, upon and by virtue of a certain promissory note in writing, bearing date, to wit, &c. (*the date*) heretofore, to wit, on the day and year last aforesaid, at &c. (*venue*) aforesaid, made by the said plaintiff, and whereby he the said plaintiff then and there promised to pay [two] months after the date thereof, to the said defendant, or his order, the sum of £— for value received. On a promissory note made by plaintiff.

## SET-OFF.

On a promissory note indorsed by plaintiff to defendant (a).

[*Commencement and conclusion of plea, or notice of set off, as ante, 981 to 983.*]—And also in the further sum of £— of like lawful money, upon and by virtue of a certain promissory note in writing, bearing date, to wit, &c. (*the date*) heretofore, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, made by one E. E. and whereby he the said E. F. then and there promised to pay [two] months after the date thereof to the said plaintiff or his order, the sum of £— for value received, and which said promissory note he the said plaintiff, afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, indorsed and delivered to the said defendant, and which said promissory note, when the same became due and payable, according to the tenor and effect thereof, to wit, on, &c. (*day it fell due*) at, &c. (*venue*) aforesaid, was presented and shown to the said E. F. for payment thereof, but the said E. F. then and there neglected and refused to pay the said sum of money in the said promissory note specified, whereof the said plaintiff afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, had notice.

For use and occupation (b).

[\*939]

Work and labor, and materials.

Goods sold.

Money counts, and interest, and accounts stated.

[*Commencement and conclusion of plea, or notice of set-off, as ante, 931 to 983.*]—For the use and occupation of a \*certain messuage and premises, with the appurtenances of the said defendant by the said plaintiff, and at his special instance and request, and by the sufferance and permission of the said defendant for a long time before then elapsed, had held, used, occupied, possessed, and enjoyed; and also for the work and labor, care, diligence, and attendance of the said defendant by the said defendant and his servants, before that time done, performed, and bestowed, in and about the business of the said plaintiff and for the said plaintiff, and at his request, and for divers materials, and other necessary things by the said defendant, before that time found and provided and used and applied in and about the said work and labor, for the said plaintiff at his like request; and for divers goods, wares, and merchandizes, sold and delivered by the said defendant to the said plaintiff at his like request; and for money by the said defendant, before that time, lent and advanced to, and paid, laid out, and expended for the said plaintiff at his like request; and for other money by the said plaintiff before that time had and received to and for the use of the said defendant; and for other money due and owing from the said plaintiff to the said defendant for interest upon and for the forbearance of divers large sums of money due and owing from the said plaintiff to the said defendant, and by the said defendant forborne to the said plaintiff for divers long spaces of time before then elapsed, at the like special instance and request of the said plaintiff; and for other money due and owing from the said plaintiff to the said defendant upon an account stated between them.]—*Conclude the plea, or notice of set-off, as ante, 932, 933.*

Plea to action for goods sold, that they were sold.

[*First plea, general issue, as ante, 908; second plea, actio non, to the counts for goods sold, as ante, 906, third form.*]—Because he says, that the said goods, wares, and merchandizes in the said (*first and second counts mentioned*) were with the knowledge, privity and consent of the

(a) See the form, ante, 937.

(b) See the form, in a declaration, ante,

41. If the rent be due on a lease, the form must be as ante, 936.

said plaintiff, sold and delivered to the said defendant by one J. S. being then and there the agent and factor of, and for the said plaintiff, in his the said J. S.'s own name, and the true and sole owner thereof, and as and for this the said J. S.'s own proper goods, wares, and merchandizes, and that the said plaintiff did not appear nor was he known by the said defendant at or before the time of the said sale and delivery of the said goods, wares, and merchandizes, to the said defendant, as the proprietor of the same, or that he the said plaintiff was in anywise interested therein; and the defendant further says, that he then and there bought and accepted and received the said goods, wares, and merchandizes, of and from the said J. S. as the proper goods, wares, and merchandizes of him the said J. S.; and that credit for the said goods, wares, and merchandizes was given to the said defendant by the said J. S. and not by the said plaintiff (d). And the said defendant further says, that the said J. S. before and at the time of the sale and delivery of the said goods, wares, and merchandizes, and thence continually hitherto, to wit, at, &c. (*venue*) was and still is indebted to the said defendant in a large sum of money, to wit, the sum of £—of lawful money, for money before then paid by the said defendant for the said J. S. at his special instance and request, and for other money before then had and received by the said J. S. for the use of the said defendant, and for other money, wherein the said J. S. was found to be in arrear to the said defendant upon an account stated between them [*so stating the cause of set-off, as usual*] which said sum of money so due and owing from the said J. S. to the said defendant as aforesaid, exceeds the sums of money so due and owing from the said defendant to the said plaintiff, upon and by virtue of the causes of action in the said first and second counts of the said declaration mentioned, and out of which said sum of money so due and owing from the said J. S. to the said defendant as aforesaid, he the said defendant is ready and willing, and hereby offers to set off and allow to the said plaintiff, the full amount of the said sums of money so due and owing from the said defendant to the said plaintiff, upon and by virtue of the causes of action in the said first and second counts in the said declaration mentioned (e), and this he the said defendant is ready to verify, &c.—[*Conclude as ante*, 907, *seventh form*.]

SET-OFF.

by plaintiff's factor as a principal, plaintiff being unknown to defendant, and that at the time of the contracts the defendant had a set-off against the factor (c).

[*First plea, non assumpsit, as ante*, 908; *second plea, actio non, as ante*, 906, *third form*.]—Because he says, that the said defendant, [or, *if by*

STATUTE  
OF  
LIMITATIONS.

(c) That this is a good plea, and that it may be pleaded specially, see 4 B. & Cres. 547.—7 D. & R. 42, S. C.—7 T. R. 359; and see the form of replication suggested in 4 B. & C. 547, and 7 D. & R. 42, S. C.

(d) *Quere*, whether the legal effect is not, that the plaintiff, by his agent, did give credit. In another MS. form those words were omitted.

(e) In 4 B. & Cres. 547.—7 D. & R. 42, S. C.—The plea here stated the defendant's readiness to set-off "according to the form of the Statute, &c." but the averment appears to have been considered incorrect, see *per Littleton, J.*

(f) See forms, *Lil.* 32.—2 Rich. C. P. 16, 32.—*Morg.* 217. Formerly the plea stated the time when the bill was exhibited, but this is not necessary, 2 Saund. 123, n. 5. And defendant may either under this plea show in

evidence the time the plaintiff's bill was actually filed. 5 B. & Cres. 149. The statute of limitations must be pleaded in assumpsit, though the declaration state the promise to have been made above six years before the title of the declaration, 2 Saund. 63, n. 6.—1 Saund. 283, n. 2. But where the statute is not pleaded, still the jury may presume, from length of time and other circumstances, that the debt has been satisfied. 2 Stark. 497.—5 Esp. 52.—1 Taunt. 572; but see 1 D. & R. 19. In *indebitatus assumpsit*, and in other instances where the statute begins to run from the time of the promise, the above plea is proper, but in other cases where the cause of action accrued after the making of the promise, the plea should be *actio non accrevit*, as in the next form, 16 East, 421.—1 Saund. 38, n. 2. 283, n. 2.—2 Saund. 63 c. n. 6. Murdock

*Non assumpsit infra sex annos* (f).

STATUTE  
OF  
LIMITA-  
TIONS.

[\*941]

Acti. non  
accrevit  
infra sex  
annos(g).

*an executor, say, "the said E. F. deceased,"*] did not, at any time within six years next before the exhibiting of the bill of the said plaintiff in this behalf, [or, in *C. P.* or, *if by original, say, "before the commencement of this suit,"* [or, *if at the suit of an attorney, "before the suing forth of the said writ of privilege,"* undertake or promise in manner and form as the said plaintiff hath above thereof complained against him. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

~~First plea, general issue; second plea, actio non, as ante, 906, first precedent.] Because he says, that the said several supposed causes of action in the said declaration mentioned, (if any such there were or still are,) did not, nor did any or either of them accrue (to the said plaintiff (h) at any time within six years next before the exhibiting of the bill (i) of the said plaintiff, against the said defendant in this behalf, [or, if in *C. P.* or, *if by original, say, "next before the commencement of this suit,"*] in manner and form as the said plaintiff hath above thereof complained against him the said defendant. And this, &c.—[*Conclude with a verification, as ante, 907, sixth precedent.*]~~

BY AND  
AGAINST  
EXECU-  
TORS, &c.

General  
issue that  
neither the  
testator  
nor the  
defendant  
promised.  
Defendant  
*ne unques  
executor*  
(k).

C. D. }

ats.

A. B. }

And the said defendant, by — his attorney, comes and de-

fends the wrong and injury, when, &c. and says, that the said

E. F. in his life-time, (and if there be counts in the declaration on the de-

fendant's promise, say) [and the said defendant since his decease,] did

not [nor did either of them,] undertake or promise in manner and form

as the said plaintiff hath above thereof complained against the said de-

fendant, and of this the said defendant puts himself upon the country, &c.

[*First plea, non assumpsit; second plea, actio non, as ante, 909, third*

*form.*—Because he says, that he the said defendant never was executor

v. Winter's Admr. 1 Harr. & Gill. 470.

Where there are counts in the declaration

on promises by or to executors, assignees,

&c. the plea of the Statute of Limitations must,

if intended to apply to those counts, be so

framed as to answer them. 2 Saund. 63 d.—

2 Stra. 919.—2 Hen. Bla. 561; and if not

intended to apply to those counts. it should be

qualified in the introductory part. When this

statute is a bar, see Tidd's Prac. 9th ed. 14 to

17.—3 Chit. Com. Law, 681.—Chit. jun.

Contr. 810.

(g) See forms, Plead. A. 451.—1 Rich. C

P. 149. See note to the preceding form. This

plea is necessary whenever the declaration con-

tains a count on a cause of action which did

not accrue until after the making of the con-

tract, and will suffice in all cases, and seems in

general preferable to the preceding precedent.

2 Saund. 63 d.—1 Saund. 83.—16 East, 421.

(h) Omit these words, if the action be at

the suit of executors. If at the suit of the

assignee of a bankrupt, see 2 Saund. 63 d. n.

(i) Defendant may show in evidence the time

of the actual filing of the bill, in order to sup-

port this averment and plea, 5 B. & Cress. 149.

(k) If the defendant intends to deny his being

executor or administrator, he must plead such

denial specially as above, for unless pleaded,

his representative character is admitted. If

defendant intends denying he has taken upon

himself the burthen of the execution of the will,

he should plead accordingly, see 1 M. & P. 677.

The plea of *ne unques* executor may be plead-

ed in bar as above. Com. Dig. Pleader, 2 D.

7.—3 Salk. 1.—2 Ld. Raym. 1207.—1 Saund.

274, n. 8. If the probate was taken out, but

not till after the action brought, the above

plea will not suffice, 3 C. & T. 123. The plea

of *ne unques* executor, does not deny the cause

of action, but only that the defendant is one of

the representatives of the testator, 1 Saund.

207, n. As to the plea of plaintiff being *ne*

*unques* executor, see 2 Stark. Evid. 548. See

the forms, Rast. Ent. 822 a. 829 b. pl. 10. 330

a.—Co. Ent. 144 b.—Lib. Plac. 427, pl. 27.—

6 Wentw. 293.—Id. Ind. xxvi.—1 Rich. C. P.

454.—See ib. pleaded in abatement, 1 Wentw.

14. A plea that defendant is administrator,

not executor, is in abatement. Under this

plea the defendant may give in evidence that

there were *bona notabilia*, in other dioceses,

for it confesses, and avoids, and does not falsify

the seal of the ordinary. 1 Saund. 274, 5. See

5 B. & Cress. 492.—Post, 942.—1 Salk. 297,

298.—5 Mod. 145. If this plea, or a release to

the defendant himself, be falsely pleaded, *rem-*

*ble* that the defendant will be liable, *de bonis*

of the last will and testament of the said E. F. deceased, nor ever administered (I) any of the goods and chattels which were of the said E. F. deceased, at the time of his death, as executor of the last will and testament of the said E. F. deceased, in manner and form as the said plaintiff hath above in his said declaration in that behalf alleged. And this, &c.—[Conclude with a verification (m), as ante, 907, sixth form.]

BY AND  
AGAINST  
EXECUTORS,  
&c.

[First plea, general issue (o) ; second plea, *actio non*, as ante, 906, [ \*942 ] third form.]—Because he says, that he is not, nor ever hath been administrator of the goods or chattels, rights or credits, which were of the said E. F. deceased, in manner and form aforesaid, as the said plaintiff hath above, in his said declaration in that behalf alleged. And this, &c.—[Conclude with a verification, as ante, 907, sixth form.]

Defendant  
ne unques  
adminis-  
trator(n).

C. D. ats. } And the said defendant, by — his attorney, Plaintiff  
A. B. suing as admin- } comes and defends the wrong and injury, when, ne unques  
ministrators, &c. } &c. and craves oyer of the said supposed letters adminis-  
of administration, and they are read to him in trator after  
these words, &c. [here set them out verbatim] which being read and craving  
heard the said defendant says, that the said plaintiff ought not to have or oyer of  
maintain his aforesaid action thereof against him, because he says, that letters of  
the said plaintiff is not, nor ever hath been, administrator of the goods or adminis-  
tration(p)  
chattels, rights or credits, which were of the said E. F. deceased, in man-  
ner and form as the said plaintiff hath above in that behalf alleged. And  
this, &c.—[Conclude with a verification, as ante, 907, sixth form.]

*proprie*, 1 Saund. 336.—Wightw. 18.—Toller, 2d edit. 463, 474, when not, 1 B. & A. 224. Post, 264, 4. As to pleas by executors in general, see Toller, 2d edit. 472, 8, 4.

The plea of *ne unques* executor may be pleaded with the general issue, and with *plene administravit*, &c. Fortesc. 336.—Com. Dig. Pleader, E. 2. If there be any doubt whether the defendant may not have made himself executor *de son tort*, it is dangerous to plead *ne unques* executor, because it may render the defendant personally liable for the debt and costs, though he may not have assets to the amount, 1 Saund. 336 b. n. 10; but there will be no danger as to the costs, if the defendant plead with his plea, the plea of *plene administravit*, and the plaintiff proceeds to trial, but does not succeed upon it, 1 B. & A. 254.—8 Taunt. 129. If there be no good ground of defence under *non assumpsit*, it is best not to plead it, or indeed any other plea not maintainable, see post, 948, n.

(f) This seems proper, because a person who has wrongfully administered, may be sued as an executor generally, 1 Saund. 265, n. 2.

(g) It is usual to conclude this plea with a verification. It should seem, however, that as the subject-matter of its denial of an allegation in the declaration, it might conclude to the contrary.

(h) See the notes to the preceding form. This is a good plea in bar. Com. Dig. Pleader, 3A 18, and as a person cannot be sued as administrator *de son tort*, it is not necessary in this plea to aver that the defendant never administered, 6 T. R. 551. *Semble* if the de-

ceased made a will, it must be pleaded specially that he made it, and that it was proved, and it must be traversed that he died intestate, see form, Plowd. 282.—Com. Dig. Administrator, B. 1—2 Saund. 47, n. The pleas usually conclude with a verification, but see note, preceding page. If the plea be that defendant is executor, not administrator, see 1 Salk. 297.—5 Mod. 145.

(o) See note, ante, 941 a.

(p) In an action of assumpsit by an administratrix upon a promissory note, given to her intestate, it was averred in the declaration as usual, that administration of the effects of intestate was duly granted by the bishop of C., and the above plea was pleaded; and issue being joined, the letters of administration granted by the bishop of C. were produced by the plaintiff, but it was also proved that the intestate, at the time of his death, had *bona notabilia* in another diocese, in a different province, and no evidence was given as to the residence of the defendant at the death of the intestate. It was held, first, that the letters of administration were not void, inasmuch as the other diocese in which the intestate had *bona notabilia* was in a different province; and, secondly, that the only question raised upon the issue was whether the letters of administration were duly granted by the bishop of C., and that it was no part of the issue whether the defendant, at the death of the intestate, resided within the diocese of C. The fact of his residence elsewhere, if relied upon, ought to have been specially pleaded. 5 B. & C. 491.—3 D. & Ry. 247, 8 C.

BY AND  
AGAINST  
EXECUTORS,  
&c.

Plaintiff  
vs unques  
adminis-  
trator as  
to causes  
of action  
contained  
in declara-  
tion (g).  
Plea as to  
all the  
counts, ex-  
cept the  
last, that  
testator  
appointed  
the plain-  
tiff, and  
the defend-  
ant, and  
another,  
joint ex-  
ecutors  
(r).

[\*943]  
Plea to the  
last count  
of the de-  
claration,  
that if any  
promise  
was made  
it was  
made by  
all the ex-  
ecutors  
jointly,  
and con-  
cluding  
in bar.

Plea to an  
action  
against an  
executor,  
that there  
were other  
contract-  
ing parties  
besides the  
testator,  
who sur-  
vived the  
testator.  
Plene ad-  
ministra-  
vit (s).

[*Actio non, as ante, 906.*]—Because he saith that the said plaintiff, as to the said several supposed causes of action in the said declaration mentioned (q), is not nor ever was administratrix of the goods, chattels, and effects which were of the said J. W. deceased, in manner and form as, the said plaintiff hath above in her said declaration in that behalf alleged. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

And for a further plea in this behalf, as to all the counts of the said declaration except the last, the said defendant, by leave of the court here, for this purpose first had and obtained, according to the form of the Statute in such case made and provided, says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, "because he says, that the said E. F. the testator, in the said declaration mentioned, in his life-time, to wit, on, &c. at, &c. (*venue*) aforesaid, duly made and published his last will and testament in writing, and thereof constituted and appointed the said defendant, the said plaintiff, and one G. H. joint executors, and afterwards, to wit, on, &c. (*venue*) aforesaid, died without altering or revoking his last will and testament, and this he the said defendant is ready to verify, wherefore he prays judgment, if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c. And for a further plea in this behalf, as to the said last count of the said declaration, the said defendant by like leave, &c. [*actio non, ut supra*] because he says, that the said promise and undertaking, in the said last count mentioned, if any such was made, was made by the said defendant, together with the said plaintiff and G. H. jointly and not by the said defendant separately, and without the said plaintiff and G. H. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

\*[*First plea, general issue; second plea, by leave, &c. actio non, as ante, 906, third form.*]—Because he says that the said several supposed promises and undertakings, in the said declaration mentioned (if any such were made), were and each and every of them was made by the said E. F. in his life-time, jointly with certain other persons, to wit, G. H. and I. K. who had survived the said E. F. and are still living, to wit, at, &c. (*venue*) aforesaid, and not by the said E. F. alone, as by the said declaration as above supposed. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

[*First plea, general issue, (t), as ante, 908; second plea, actio, non*

(q) See 5 B. & C. 491, 497, and the observation of Bayley, J. and form, *id.* 492.

(r) As to the validity of this plea, see 2 B. & P. 124, 125. The plaintiff might reply that he did not prove the will, see 8 T. R. 557.

(s) See forms, 2 Saund. 220.—2 Rich. C. P. 10, 245. If the defendant have any assets in hand he should plead *plene administravit preter* as in the form, post, 964. In an action against an executor of an executor, the plea must show a due administration by each. 10 East, 815.—See post, 944.

(t) Unless there be some sufficient ground on which the plaintiff's demand may be disputed, it is not advisable to plead the general issue, or any other plea disputing the debt. 2 Bl. Rep. 1275.—1 Saund. 836 b. where the defendant pleads *non assumpsit* and *plene administravit*, if the plaintiff take judgment of

assets in futuro upon the latter plea, and go to trial upon the plea of *non assumpsit*, he will be entitled to costs if he obtain a verdict, and therefore in such case, unless the defendant has a good ground of defense upon *non assumpsit*, it is usual for him to move to withdraw his plea, which the court will permit him to do on payment of costs, 2 Bl. Rep. 1275. 9 B. & C. 655.—Tidd, 9th ed. 980. But if an executor plead several pleas, and the plaintiff take issue on them, and any one of them a bar to the action (as *plene administravit*, or the like) be found for the defendant, he will, as in ordinary cases, be entitled to the costs of the trial. 1 B. & A. 254.—8 Taunt. 129.—9 B. & C. 657, *acc.*—See *vide* 12 East, 232.—5 East, 261. When an executor or administrator pleads *plene administravit*, or judgments outstanding and *plene administra-*

(a), as ante, 906, third form.]—Because he says, "that he hath fully administered all and singular the goods and chattels, which were of the said E. F. deceased, at the time of his death, and which have ever come to the hands of the said defendant as executor (or, "as administrator") as aforesaid, to be administered, to wit, at, &c. (venue) aforesaid; and that he the said defendant (w) hath not, nor on the day of exhibiting the bill of the said plaintiff in this behalf (x), (or, if in C. P. or by original, "at the time of the commencement of this suit") or at any time since (y), had any goods or chattels which were of the said E. F. deceased, at the time of his death, in the hands of the said defendant as executor (or "as administrator," as aforesaid, to be administered (1). And this, &c.—[Conclude with a verification, as ante, 907, sixth form.]

BY AND  
AGAINST  
EXECU-  
TORS, &c.

[Actio non, as ante, 906, third form.]—Because he says, that the said G. H. (the first executor) in his life-time, did fully administer all and singular the goods and chattels which were of the said E. F. (the first testator) deceased at the time of his death, and which ever come to the hands of the said G. H. (the first executor) as such executor, to be administered. And that the said defendant (the executor of the executor) hath fully administered all and singular the goods and chattels, which were of the said E. F. (the first testator) deceased, at the time of his death, and which have ever come to the hands of the said defendant, as executor as aforesaid, to be administered, to wit, at, &c. (venue) aforesaid (a): and that the said defendant hath not, nor on the day of exhibiting the bill of the said plaintiff in this behalf, or at any time since, had any goods or chattels which were of the said E. F. (the first testator) deceased, at the time of his death, in the hands of the said defendant, as executor as aforesaid, to be administered. And this, &c.—[Conclude with a verification, as ante, 907, sixth form.]

Plene ad-  
ministravit, by the  
executor of  
an execu-  
tor (z).

[\*945]

[Actio non, as ante, 906, first form.]—Except as to the sum of £—(c) Plene ad-

ministravit preter, and the plaintiff, admitting the truth of the plea, takes judgment of assets in futuro, the defendant is not liable to costs. Tidd, 5th edit. 980. Nor does he seem to be liable thereto when he pleads *plene administravit preter*, and the plaintiff admitting the truth of the plea, takes judgment of the assets in futuro. Id.—Rast. Entr. 828.—8 Co. 184.—2 Sand. 226.

On a plea of *plene administravit* by several executors, if some are shown to have assets in hand, and the others not, the latter are entitled to a verdict. Mo. & Mal. C. N. P. 380.

(b) This seems proper in all cases, 4 East, 306. 2 Sand. 216, n. 1. 220, n. 3.

(w) The words within the brackets, "that the executor hath fully administered the goods, &c." are usually inserted, but it has been said are superfluous, and that the more formal and correct way of pleading is to omit these words. 2 Sand. 220, n. 3. But according

to 2 Sand. 220, n. a. 5th edit. by Messrs. Patterson and Williams, it is better they should be inserted (2).

(x) This is material, 2 Sand. 216, n. 1, 220, n. 3.—4 East, 508. Under this allegation the defendant may give in evidence any due administration of assets. 1 Esp. Rep. 814.

(y) Material, 3 East, 875.—Cro. Jac. 132; and as to the replication to it, see 6 T. R. 11. Post, 1118.

(z) The above is the form of the amended plea, in Wells and Fyde, 10 East, 815.

(a) It is necessary to aver that the first executor had fully administered, 10 East, 815.

(b) See the forms, Rast. Entr. 828 a—3 Wentw. 211, 214.

(c) Some of the forms pray judgment generally, Rast. Entr. 824.—3 Went. 211.—Others do not commence, but only conclude with a prayer of judgment, except as to the assets acknowledged, 3 Wentw. 211, 214. The latter

Plene ad-  
ministravit  
preter  
(b).

(1) In Pennsylvania, a general verdict for the plaintiff on the pleas of *non assumpsit*, *plene administravit* and debts of a higher nature, is substantially, a finding of assets to the amount of the demand, and good. Strohecker v. Drinkle, 16 Serg. & Rawle, 88.

(2) See Fowler v. Sharp, et al. Ex. 15 Johns. 328, where a plea omitting these words was held good upon special demurrer.

BY AND  
AGAINST  
EXECU-  
TORS, &c.

because he says, that he the said defendant hath fully administered all and singular the goods and chattels which were of the said E. F. deceased, at the time of his death, and which have ever come to the hands of the said defendant, as executor, [or, "as administrator"] as aforesaid, to be administered, [except goods and chattels of the value of £—] to wit, at, &c. (*venue*) aforesaid, and that he the said defendant hath not, nor on the day of exhibiting the bill of the said plaintiff in this behalf, [or, if in *C. P.* or by original, "at the time of the commencement of his suit,"] or at any time since, had any goods or chattels which were of the said E. F. deceased, at the time of his death, in his hands to be administered, except the said goods and chattels of the value aforesaid, [or, *the said sum of £—*.] And this he the said defendant is ready to verify, wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against the said defendant, except as to the said sum of £—, &c.

[\*946] \**[First plea, general issue, as ante, 908; second plea, plene administravit, as ante, 943; third plea, actio non, as ante, 906, third form.]*  
Plea of retainer by an executor (d). Because he says, that the said E. F. in his life-time, to wit, on, &c. (*date of bond* the — day of — A. D. — at, &c. (*venue*) aforesaid, by his certain writing obligatory, sealed with his seal, and now shown to the court here, the date whereof is a certain day and year therein mentioned, to wit, the day and year last aforesaid, acknowledged himself to be held and firmly bound unto the said defendant, in the sum of £— of lawful money of Great Britain, to be paid to the said defendant, with a condition thereunder written, that if, &c. [*here set out the condition*] (e) which said writing obligatory was so made as aforesaid, for securing the payment of a just debt (f), and at the time of the death of the said E. F. was, and still is in full force and effect, not in the least reversed, satisfied, or otherwise vacated, and before and at the time of the commencement of this suit, a large sum of money, to wit, the sum of £— payable to the said defendant, under and by virtue of the said writing obligatory for principal and interest, was and still is, unpaid and unsatisfied to the said defendant (g). And the said defendant further saith, that the said E. F. in his life-time, and at the time of his death, was justly and truly indebted to the said defendant in a large sum of money, to wit, the sum of £— of like lawful money, for, &c. [*here state the particulars of the set-off on simple contract, as ante, 937, to 939,*] and which said

On a bond.

On a simple contract debt.

[\*947] last-mentioned \*sum of money still remains wholly in arrear, unpaid, and unsatisfied to the said defendant. And the said defendant further saith, that the said E. F. in his life-time, to wit, on

precedent also avers the bringing the money into court, but this is unnecessary, for the assets confessed may be goods or a leasehold interest, not capable of being brought into court. The same precedent also admits a liability to costs, but this is incorrect, for if the plea be true, the defendant is not liable to costs. Ante, 948, note.

(d) See forms, 1 Saund. 333.—3 Wentw. 219, 244.—Id. Ind. xxvi. to xxxiii.—2 Rich. C. P. 230, 254. A retainer may be pleaded or given in evidence under the plea of *plene administravit*, 1 Brownl. 75.—6 Burr. 1380, 5. 2 Bl. Rep. 965.—Co. Lit. 233 a. But it is in general advisable to plead it, in order to compel the plaintiff, by his replication, to admit

either the retainer or the insufficiency of the assets; and as to what may be pleaded by way of retainer, see 1 B. & A. 664, 2 Stark. 523 see form of plea of retainer under marriage settlement, 4 Price, 89; how to frame plea in general, id.

(e) When it is proper to state the condition of the bond in the plea, see 1 Saund. 333, n. 7.—5 T. R. 309.

(f) In pleading a retainer on a bond debt it is not necessary to aver, that the bond was given for a just and true debt, 6 T. R. 550.—Saund. 330, n. 4, 333, n. 6.

(g) It seems proper in all cases to show how much is due on the bond 3 T. R. 80. 1 Saund. 333, note 7.



BY AND  
AGAINST  
EXECUTORS,  
&c.

do. (*date of will, or about it*) at, &c. (*venue*) aforesaid, duly made and published his last will and testament (*h*) in writing, and thereby constituted and appointed the said defendant executor thereof, and afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, the said E. F. died, without revoking or altering his said will; after whose death the said defendant duly proved the said will, and took upon himself the burthen of the execution thereof, to wit, at, &c. (*venue*) aforesaid; and the said defendant further saith, that he hath fully administered all and singular the goods and chattels which were of the said E. F. at the time of his death, and which have ever come to the hands of the said defendant, as executor, [*or, "as administrator"*] as aforesaid, to be administered, except goods and chattels of small value, to wit, of the value of £10 (*i*), and that he hath not, nor on the day of exhibiting the bill aforesaid, [*or if in C. P. or by original, "at the time of the commencement of this suit,"*] or at any time afterwards, had any goods or chattels which were of the said E. F. deceased, at the time of his death, except the said last-mentioned goods and chattels of the value aforesaid, which are not sufficient to pay or satisfy the monies due and owing to the said defendant as aforesaid, and which he the said defendant retains in his hands, towards and in part satisfaction and payment thereof, and this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

[*Actio non, as ante, 906, first form.*—Because he says, that one G. H. heretofore, and in the life-time of the said E. F. to wit, in (*k*) ——— Term, in the ——— year of the reign of our lord the now king, in the court of our said lord the king, before the king himself, [*state the recovery of the judgment against the deceased in the King's Bench, Common Pleas, or Exchequer, whether in assumpsit or debt, &c. precisely as in the precedents, ante, 482 to 498, and conclude as in those precedents, with a reference to the record, and an allegation that the judgment is still in force; see the precedent in 1 Saund. 329, and then proceed as follows:*—And the said defendant further saith, that the said E. F. in his life-time, to wit, on, &c. [*date of bond,*] at, &c. (*venue*) aforesaid, by his certain writing obligatory, sealed with his seal, became held and firmly bound to one J. K. in the sum of £—— of lawful money of Great Britain, to be paid to the said J. K. which said writing obligatory was so made as aforesaid, for securing the payment of a just debt (*l*), and at the time of the death of the said E. F. was and still is, in full force and effect, not in

Judgment recovered against testator, an outstanding bond, and a judgment against defendant (*j*) [*949*] Judgment against deceased. Bond outstanding.

(*k*) In an action against an administrator, it is not necessary in his plea of retainer to state the letters of administration, because the defendant admits it, 6 T. R. 550; but it is otherwise in the case of an executor, who pleads a retainer in that character, 1 Mod. 28. But see 6 T. R. 550.—2 Stra. 1106; and therefore the above allegation of the will and appointment of the defendant as executor is in general advisable, and if in an action against a person sued, as executor, he plead a retainer as administrator, the letters of administration should be stated, Sir T. Jones, 23.—6 T. R. 550.

(*i*) Some value ought to be stated, though the precise amount is not material or traversable, 1 Saund. 323, n. 7.

(*j*) See precedents, 8 Wentw. Ind. xxvi,

to xxxiii., 1 Saund. 329 to 339.—Lutw. 446, 447.—Lil. Ent. 57, 100, 111, 117, 119, 159.—2 Rich. C. P. 96 to 117.—Plead. Assist. 370. And as to the form of a plea of this nature in general, see 1 Saund. 329 to 339, in the notes. An unsatisfied decree in equity cannot be pleaded but that court will relieve. 11 Vin. Ab. 591.—Freem. 333.—3 P. Wms. 401, n. f. Toller, 270.

(*k*) The plea must state the Term and year when, and the court in which the judgment was obtained, 1 Saund. 329, note 1, and as to the mode of stating a judgment recovered against the deceased, id. ibid. note 2. An erroneous judgment is sufficient, 1 Stra. 407.

(*l*) This allegation is usual, though it is not necessary. If the debt were not a just one, the plaintiff might show it in his repli-

BY AND  
AGAINST  
EXECUTORS,  
&c.  
Judgment  
against de-  
fendant  
(o).

any, wise cancelled, annulled, paid off, or satisfied, and before and at the time of the commencement of this suit, there was and still (*m*) is due and owing to the said J. K. upon and by virtue of the said writing obligatory, a large sum of money, to wit, the sum of £— to wit, at, &c. (*venue*) aforesaid (*n*). And the said defendant further saith, that one L. M. after the death of the said E. F. to wit, — Term, in the — year of the reign of our lord the now king (*p*), impleaded the said defendant as executor of the last will and testament of the said E. F. deceased, [*or*, as administrator of all and singular the goods and chattels, rights and credits, which were of the said E. F. at the time of his death, who died intestate,"] in the court of our said lord the king, before the king himself, [*or*, "of the bench,"] at Westminster, in the county of Middlesex, in a certain plea of debt (*q*), for the sum of £— due and owing to the said L. M. from the said E. F. in his life-time, and at the time of his decease; and such proceedings were thereupon had in the said court of our said lord the king, at Westminster aforesaid in that plea, that the said L. M. afterwards, to wit, in that same — Term, in the — year aforesaid, by the consideration and judgment of the said court recovered against the said defendant as executor [*or*, "as administrator,"] as aforesaid his said debt of £— and also £— which by the same court were adjudged to the said L. M. for his damages which he had sustained, as well on occasion of the detaining of that debt as for his costs and charges by him about his suit in that behalf expended, to be levied of the goods and chattels which were of the said E. F. at the time of his death in the hands of the said defendant to be administered, if he had so much thereof in his hands to be administered, and if he had not so much thereof in his hands to be administered then the sum of £— parcel of the damages aforesaid, being the amount of the costs and charges aforesaid, to be levied of the proper goods and chattels of the said defendant. Whereof the said defendant was convicted as by the record and proceedings thereof, remaining in the said court of our said lord the king before the king himself, at Westminster aforesaid, more fully appears. Which said judgment so had and obtained aforesaid, was had and obtained for a true and just debt due and owing to the said L. M. from the said E. F. in his life-time, and at the time of his death (*r*) and still remains in full force and effect, not in anywise reversed, annulled, discharged, or satisfied (*s*); and before and at the time of the commencement

[ \*950 ]

action, 1 Saund. 330, n. 4, 338, n. 6.—1 M. & S. 845.

(*m*) See Toller, 281.—11 Vin. A. B. 304.

(*n*) The defendant may plead the penalty as the outstanding debt, or may show what is really due, and the latter mode is recommended; and sometimes it is proper to set forth the condition of the bond, ante, 946.—5 T. R. 309.—1 Saund. 338, note 7.

(*o*) As to the mode of pleading a judgment against the defendant as executor or administrator, see 1 Saund. 329, n. 3, 330, n. 4, 331, n. 5. Formerly it was the practice in all cases to set forth the bond or other debt, upon which the judgment was founded, and the pleadings in the action, 1 Saund. 329, note 8, but the present mode of pleading, *in assumpsit*, a judgment obtained against an executor or administrator, is as above, not stating the nature of the debt, or the proceed-

ings; and though it is stated in 1 Saund. 331, n. 5, to be proper as set forth the declaration or pleadings in the action is not usual; but in a plea to an action of debt on *specialty*, it is still necessary to show that the debt on which the judgment was recovered was a *specialty*, or to aver, that judgment was recovered before the defendant had notice of the plaintiff's demand, see 1 T. R. 690.—5 Id. 238.—1 Sid. 333. See a plea of judgment recovered against defendant as executor *puis darrein continuance*, post, 1245.

(*p*) This is necessary, see ante, 948, n.

(*q*) The judgment is to be described according to the fact, whether in *assumpsit*, debt, or covenant, see the mode of stating the judgment, ante, 948.

(*r*) This is not necessary, see ante, 948, n.

(*s*) This is unnecessary, see 1 Saund. 330, n. 4.

of this suit, there was and still is due and owing to the said L. M. upon and by virtue of the said last-mentioned judgment, a large sum of money, to wit, the sum of £— to wit, at, &c. (*venue*) aforesaid (*t*). And the said defendant further saith, that he hath fully administered all and singular the goods and chattels which were of the said E. F. deceased, at the time of his death, which have ever come to his hands to be administered, except goods and chattels of small value, to wit, of the value of £10 (*u*) and that he the said defendant hath not, nor on the day of exhibiting the bill of the said plaintiff in this behalf, [or, *in C. P. or by original*, "at the time of the commencement of this suit,"] or at any time since, had any goods or chattels which were of the said E. F. at the time of his death, in his hands to be administered, except the said goods and chattels of the value aforesaid, which are not sufficient to satisfy the several debts aforesaid, due and owing on the said judgments and writing obligatory (*according to the fact*) and which are subject and liable to satisfy the said several debts. And this, &c.—[*Conclude with a verification, as ante, 907, sixth precedent (w).*].

BY AND  
AGAINST  
EXECU-  
TORS, &c.

*Plene ad-  
ministravit  
prætor.*

(*t*) As to this allegation, see ante, 946, n. 946, n.

an averment of the intestate's being the same person as mentioned in the bond and record of judgment, but it is not material, and is now omitted, 1 Saund. 334, n. 8.

(*u*) As to this allegation, see ante, 947, n.

(*w*) Formerly this plea was concluded with

## •PLEAS IN DEBT.

GENERAL  
ISSUE, &c.

*In the King's Bench, (or "C. P." or "Exchequer.")*

— Term, — Will. 4.

*Nil debit* generally (x).  
C. D. } And the said defendant by E. F. his attorney, comes and de-  
ats. } fends the wrong and injury, when, &c. and says that he does not  
A. B. } owe the said sum of money [or, "the said sum of £—"] (y) above de-  
manded, or any part thereof, in manner and form as the said plaintiff hath  
above thereof complained against him, and of this the said defendant puts  
himself upon the country, &c.

*Nil debit*  
in action  
by or  
against an  
executor  
or admin-  
istrator.

*Nil debit*  
to debt *qui*  
*tam* (z).

*This form of plea nil debit will be the same as the preceding one, omitting the word "owe" and instead of it say "detain."*

C. D. }  
ats. } And the said defendant by E. F. his attorney, comes and  
A. B. (a). } defends the wrong and injury, when, &c. and says that he  
does not owe to (b) our said lord the king, [or, "to the poor of the par-  
ish of — in the county aforesaid,"] and to the said plaintiff who sues  
[ \*952 ] as aforesaid, or to either of them, the said sum of money [or, "the said  
sum of £—"] (c) above demanded, or any part thereof, in manner and  
form as the said plaintiff, who sues as aforesaid, hath above thereof com-  
plained against him, and of this the said defendant puts himself upon the  
country, &c.

(x) See forms, 1 Rich. C. P. 147, 512. Morg. 529—2 Rich. C. P. 307, 316. As to this plea in general, see ante, vol. i. Index, "*Debt (pleas in)*." It is a proper plea to debt on simple contract, or for an escape, or on a penal statute, or when the deed is mere inducement to the action; but not when the action is founded on a specialty, as on a bail bond, &c. or on a record, *Ld. Raym.* 1500.—*Com. Dig. Pleader*, 7 W. 17. See a plea of *non detinet*. 1 Rich. C. P. 147.—*Post*, 1028.—*Ante*, vol. i. Index, "*Debt (pleas in)*."

(y) If the sum be specified strictly, the plea should apply to all the sums demanded; thus, where a declaration in debt demanded 2000*l.* and contained several counts each of which stated a debt of 22*l.*, and the defendant pleaded that he did not owe the said sum of 22*l.*, it was decided that the plaintiff might sign judgment as for want of a plea, 3 B. & P. 174, but in a later case such a mistake was considered immaterial, and the amount was

rejected as surplusage, 1 D. & R. 478, and see 1 M. & P. 276, *acc.*

(z) See the form, 7 Wentw. Index, 632, 3. 1 Rich. C. P. 147.—*Lil. Ent.* 228. The 4 & 5 Anne does not allow double pleas in a penal action, 2 Wils. 21. The plea of not guilty would suffice, 1 T. R. 462.—*Ante*, vol. i. Index, "*Debt (pleas in)*."

(a) It is sufficient in a *qui tam* action, to intitle the plea with the names of the parties, without the addition of "*qui tam*, &c." to the plaintiff's name, 7 East, 333.

(b) The plea in this respect should be conformable to the declaration, and where, in an action *qui tam*, the plea stated that the defendant did not owe to the plaintiff, omitting, "and to our lord the king," it was held insufficient, *Hob.* 328. *Bac. Ab. Action qui tam*, D. and *Reg. Plac.* 302, but it would be sufficient to say he doth not owe generally *modo et forma*, &c. without specifying to whom.

(c) *Ante*, n. (y).

C. D. } And the said defendant by E. F. his attorney, comes and de- GENERAL  
fends the wrong and injury, when, &c. and says that the said sup- ISSUES, &c.  
posed (e) writing obligatory [or, "indenture," or "articles of agree- Non est  
ment," according to the fact,] is not his deed, and of this he puts him- factum(d).  
self upon the country, &c.

C. D. } And the said defendant, executor [or, "administrator,"] as The like  
aforesaid, by E. F. his attorney, comes and defends the wrong by an exe-  
and injury, when, &c. and says that the said supposed writing obligatory cutor or  
[or, "indenture," or "articles of agreement," according to the fact, as adminis-  
a declaration,] is not the deed of the said G. H. deceased, and of this trator (f)  
he puts himself upon the country, &c. [ '953 ]

C. D. } And the said defendant by E. F. his attorney, comes and de- Non est  
fends the wrong and injury, when, &c. and craves oyer of the factum af-  
said supposed (h) writing obligatory, in the said declaration mentioned, ter craving  
and it is read to him (i), &c. he also craves oyer of the condition (k) of oyer of  
the said supposed writing obligatory, and it is read to him in these words, bond and  
"Whereas," &c. [here set forth the recitals, if any, and the conditions, condition  
verbatim(l)], which being read and heard, the said defendant says, that (g).  
the said (m) supposed writing obligatory is not his deed, and of this he  
puts himself upon the country, &c.

(d) See form, 1 Rich. C. P. 146. When this is necessary or proper, see ante, vol. i. *Debt (pleas in)*.—Tidd's Prac. 9th ed. 648, 655.—2 Ld. Raym. 1500.—Com. Dig. Pleader, 2 W. 18. This plea is good in all cases where the deed was not executed, or is from the declaration. Com. Dig. Pleader, 2 W. 18; and see 6 Taunt. 894.—2 Marsh. S. 4 M. & S. 470. And a material qualification of a covenant in the deed, not noticed in the declaration, may be taken advantage of in this plea. 11 East, 668 641, 2; but see Stark. 294; 5 Moore, 164.—4 Camp. 20 and contra. And the defendant, to take advantage of a variance, should not crave oyer, but set out the deed, whereby he would in fact deny the deed set out in his plea, and that in the declaration, see 4 B. & C. 741. 4 B. & R. 249.—2 B. & A. 765.—Post, 953.

(e) When the defendant means to dispute validity of the deed, it should seem that the plea should refer to it, merely by the term "writing," or "supposed writing obligatory," "indenture," &c. and should not say, "writing obligatory," &c. generally, because such a plea would be inconsistent with the plea of defence, 1 Saund. 291 n. a. 1; see the comments, Lil. Ent. 166.—Co. Ent. 145 b.—2 Ent. 181 b, 182 a.—10 Co. 126 b.—Lutw. 307, which say only "writing."

(f) As to this plea, see Com. Dig. Pleader, 2 W. 18.—10 Co. 120. See form, 1 Rich. C. P. 146.

(g) It is not usual to plead *non est factum*, craving out the condition on oyer, unless the defendant pleads double. If the

defendant be desirous of taking an advantage of a variance in the deed as stated in the declaration, he should not crave oyer, and set it out, *non est factum*, for by that the deed so set out becomes a part of the declaration, and the only question upon the trial of that issue is whether the deed set out was executed by the defendant, 4 B. & C. 741.—7 D. & R. 249, S. C. and see 2 B. & Ald. 765.

(h) See ante, note e.

(i) Though it is usual in practice not to set forth the bond, but to say, "and it is read to him," &c. and then to pray oyer of the condition, and set it forth in *hæc verba*, yet it is said that regularly the bond ought not to be entered at large, as well as the condition, but if no use is intended to be made of the bond in pleading, there is no occasion to crave oyer of it at all, or to enter any such prayer, for it is sufficient to pray oyer of the condition only. 1 Saund. 9 b. note 1.

(k) Oyer must be demanded of the condition, to entitle the defendant to it, 1 Saund. 290, note 2.

(l) The whole condition or deed must be set forth upon oyer, and if there be any misrecital, the plaintiff may either sign judgment as for want of a plea, or he may, by his replication, pray that the deed may be enrolled, and procure it to be enrolled and demur, 1 Saund. 9 b, n. 1.—4 T. R. 370.—Tidd, 9th edit. 565, 589.

(m) This refers to the bond or deed, as set out on oyer and not to the bond or deed set out in the declaration. 4 B. & Cros. 741.—7 D. & R. 249, S. C. *supra*.

GENERAL  
ISSUES, &c.  
The like  
of an in-  
denture  
(n).

C. D. }  
ats. } \*And the said defendant by E. F. his attorney, comes and de-  
A. B. } fends the wrong and injury, when, &c. and craves oyer of the  
said supposed (o) indenture, in the said declaration mentioned, and it is  
read to him in these words, [*here set out the indenture verbatim,*] which  
being read and heard, the said defendant says, that the said supposed in-  
denture is not his deed, and of this he puts himself upon the country, &c.

*Non est  
factum,  
and nil de-  
bet, to debt  
on bond  
and simple  
contract  
joined in  
same de-  
claration.*

C. D. }  
ats. } And the said defendant by E. F. his attorney comes and de-  
A. B. } fends the wrong and injury, when, &c. and as to the said [first]  
count of the said declaration, says, that the said supposed writing obliga-  
tory therein mentioned is not his deed, and of this he puts himself upon  
the country, &c. and as to the said [second, third, fourth, and last] counts  
of the said declaration, the said defendant says that he does not owe the  
said sums of money therein mentioned, or any or either of them, or any  
part thereof, in manner and form as the said plaintiff hath above complained  
complained against him, and of this he puts himself upon the country, &c.

Plea to  
debt on  
simple con-  
tract, law  
wager, or  
*nil debet  
legem (p).*

C. D. }  
ats. } And the said defendant in his own person comes and defends  
A. B. } the wrong and injury, when, &c. and says, that he doth not owe  
to the said plaintiff the said sum of £— above demanded, or any part  
thereof, in manner and form as the said plaintiff hath above complained  
against him; and this he is ready to defend against the said plaintiff and  
his suit, however the court of our lord the king here shall consider, &c.

[ \*955 ]  
*Onerari  
non (q).*

C. D. }  
ats. } \*And the said defendant by E. F. his attorney, comes and de-  
A. B. } fends the wrong and injury, when, &c. and says, that he ought  
not to be charged with the said debt by virtue of the said supposed (r)  
writing obligatory, [*or, "indenture," &c.*] because he says, &c. [*here  
state the subject matter of the defense, and then conclude as follows :*] And  
this he the said defendant is ready to verify, wherefore he prays judg-  
ment if he ought to be charged with the said debt, by virtue of the said  
supposed writing obligatory, [*or, "indenture," &c. according to the fact.*]

(n) See the notes to the preceding form. This mode of pleading *non est factum*, is only customary when the defendant also pleads a special plea, and it may be necessary for the defendant to avail himself of the non-performance by the plaintiff of some condition precedent, &c. as a ground of defense.

(o) See ante, 952, note e.

(p) See form, Lit. Ent. 467, Mod. Ent. 242, Co. Lit. 296, and Rast. Ent. 158, where the origin and use of this plea are discussed. It is still in force. See 1 New R. 298. As to the appointment of compurgators in, see 2 B. & C. 688.—4 D. & R. 8, S. C.

(q) See form, Plead. A. 450. When the plea admits the validity of the deed, and that there was once cause of action, but avoids or discharges it by matter subsequent, the defendant should say, that "*plaintiff actionem non*, but where the validity of the deed is disputed, or where an heir pleads *rien per decent*, it is said that the defendant should say "*onerari non debet.*" 1 Saund. 290, n. 8.—Com. Dig. Pleader, E. 27.—Ld. Raym. 217.—2 Salk. 516.—1 Rich. C. P. 146.

(r) Ante, 952, note e.

C. D. }

ats. } And the said defendant by E. F. his attorney, comes and defends  
 A. B. } the wrong and injury, when, &c. and as to the said several sums  
 of money in the said declaration mentioned, and thereby demanded, ex-  
 cept as to the sum of £— (*the sum tendered*) parcel thereof, says that he  
 does not owe the same or any part thereof to the said plaintiff in manner  
 and form as the said plaintiff hath above thereof complained against him,  
 and of this he puts himself upon the country, &c. And as to the said  
 sum of £— parcel of the said several sums of money in the said declara-  
 tion mentioned, the said defendant says, that the said plaintiff ought not  
 to have or maintain his aforesaid action thereof against him to recover  
 any damages by reason of the non-payment of the said sum of £— parcel,  
 &c. because he says, that the said defendant at the time when the said  
 sum of £— parcel, &c. became due and payable from the said defendant  
 to the said plaintiff, was, and from thence hitherto hath been, and still is,  
 ready to pay to the said plaintiff the said sum of £— parcel, &c. to wit,  
 at, &c. (*venue*) aforesaid, and that after the time when the said sum of  
 £— parcel, &c. became due and payable, and before the exhibiting of  
 the bill of the said plaintiff in this behalf [or, *if in C. P. or by original*,  
 "before the commencement of this suit,"] to wit, on, &c. (*day of tender*  
*or about it*), at, &c. (*venue*) aforesaid, he the said defendant was ready  
 and willing, and then and there tendered and offered to pay to the said  
 plaintiff the said sum of £— parcel, &c. to receive which of the said de-  
 fendant the said plaintiff then and there wholly refused, and the said de-  
 fendant now brings the said sum of £— so tendered, into court here,  
 ready to be paid to the said plaintiff if he will accept the same (*t*), and  
 this he is ready to verify; wherefore he prays judgment if the said plain-  
 tiff ought to have or maintain his aforesaid action thereof against him, or  
 recover any damages by reason of the non-payment of the said sum of  
 £— parcel, &c.

PLEAS TO  
DEBT ON  
SIMPLE  
CONTRACT.  
Tender to  
debt on  
simple con-  
tract (*s*).

[ \*956 ]

C. D. }

ats. } [ *Onerari non, as ante, 954.*—Because he says, that the said  
 A. B. } defendant, at the time of the making of the said supposed con-  
 tracts in the said declaration mentioned, was an infant within the age of  
 twenty-one years, to wit, of the age of — years (*w*), to wit, at, &c.  
 (*venue*) aforesaid, and this, &c.—[ *Conclude with a verification, as ante,*  
*955.* ]

INFANCY.  
Infancy to  
debt on  
simple  
contract  
(*u*).

C. D. }

ats. } [ *Actio non, as ante, 906.* ]—Because she says, that the said  
 A. B. } defendant, at the time of the making of the said supposed con-

COVER-  
TURE.  
Coverture  
to debt on  
simple  
contract  
(*x*).

(*s*) A tender must be pleaded. See the  
 notes, and the form in assumpsit, ante, 922,  
 and the form in debt, 2 Rich. C. P. 42. As to  
 the form of this plea in debt, see 1 Saund. 33,  
 note 2. Com Dig. Pleader, 2 W. 28, and the  
 forms indexed in 7 Wentw. 576, 7, 8. Upon a  
 tender covenant for payment of money, a tender  
 may be always pleaded, 7 Taunt. 486.

(*t*) See ante, 924, if money has been paid  
 into court

(*u*) See post, 965, note, and the forms,  
 East Ent. 163 a.—Co. Ent. 125 b.—Bro. Red.  
 200.—7 Wentw. Index, 577, 8. In debt on  
 simple contracts, it should seem that infancy

might be given in evidence under the general  
 issue, but it is most advisable to plead it, ante,  
 909.

(*w*) The precise age here stated, is not ma-  
 terial.

(*x*) See the notes to the forms, ante, 909.—  
 Com. Dig. Plead. 2 W. 21. If the defendant  
 be still a feme covert, she must plead in per-  
 son, and not by attorney, ante, 899, note.  
 Coverture may be either pleaded specially, or  
 may be given in evidence under the general  
 issue *nil debet*, or *non est factum*, 8 Burr.  
 1805.—12 Mod. 191.—2 Stra. 1104. Com.  
 Dig. Pleader, 2 W. 18.

COVER-  
TURE.

tracts, was, and still is, the wife of one E. F. to wit, at, &c. (*venue*) aforesaid. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

BANK-  
RUPTCY.  
Bankrupt-  
cy of de-  
fendant(y).

*Actio non, as ante, 906.*]—Because he says, that after the said several supposed debts and causes of action in the said declaration mentioned, were contracted and accrued, and before the exhibiting of the bill of the said plaintiff in this behalf, [or, in *C. P.* “before the commencement of this suit,”] to wit, on the — day of —, A. D. —, he the said defendant became a bankrupt, within the true intent and meaning of the Statute in force concerning bankrupts, to wit, at, &c. (*venue*) aforesaid, and that the said debts were contracted, and the said causes of action in the said declaration mentioned, and each of them, did accrue to the said plaintiff, before he the said defendant so became a bankrupt as aforesaid, to wit, at, &c. (*venue*) aforesaid (z), and of this he the said defendant puts himself upon the country, &c. (a).

JUDGMENT  
RECOVERED.  
Judgment  
in debt (b).

[*Actio non, as ante, 906.*]—Because he says, that the said plaintiff heretofore, to wit, in — Term, in the — year of the reign of our said lord the king, in the court of our said lord the king, before the king himself, [or if in *C. P.*, “before Sir N— C— Tindal, knight, and his companions, his Majesty’s justices of the Bench”] at Westminster, in the county of Middlesex, impleaded the said defendant in a certain plea of debt, for the detaining and not paying the very same identical debt, and for and in respect of the same identical causes of action in the said declaration mentioned, and such proceedings were thereupon had in the said plea in that court, that afterwards; to wit, in that same Term, the said plaintiffs, by the consideration and judgment of the said court, recovered in the said plea against the said defendant, the same identical debt of £500, (*the account at the commencement*) in the said declaration mentioned, as also 1s. for their damages by them sustained, as well by the detention thereof, as for their costs and charges by them about their suit in that behalf expended, whereof the said defendant was convicted, as by the record and proceedings thereof still remaining in the said court of our said lord the king, at Westminster aforesaid, more fully and at large appears, which said judgment still remains in full force and effect, not in the least reversed, satisfied, or made void, and this the said defendant is ready to verify, wherefore he prays judgment, if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

STATUTE OF  
LIMITA-  
TIONS.*Actio non  
accruvit  
infra sex  
annos (c).*

[*Actio non, as ante, 906.*]—Because he says, that the said several supposed causes of action in the said declaration mentioned, did not nor did any or either of them accrue to the said plaintiff, at any time within six

(y) This defense must be pleaded, 1 Campb. 368.—12 East, 664. The defendant may also plead the general issue and any other plea. This plea is given by the 6 Geo. 4. c. 16. s. 126. See the notes, ante, 911, which will be here applicable. As to when defendant must plead more specially, see id. The plea must pursue the terms of the statute, 6 Bing. 686.—See form of plea of defendant’s bankruptcy to debt on bond, 2 B. & A. 808.

(z) This allegation is necessary, 4 T. R. 166.—Ante, 912, note.

(a) The plea is to conclude to the country, 1 P. Wms. 258, 9.—10 Mod. 160, 247.—4 Bing. 686.—Ante, 912.

(b) The notes, ante, 929, will be applicable to this form and plea, and should be attended to.

(c) See the notes to the form, ante, 941 which will, for the most part, apply here. The statute must be pleaded, *semble* 1 Saund. 233.—2 Saund. 626, n. 6.—Ante, vi i. Index, “*Statute of Limitations.*”



years next before the exhibiting of the bill of the said plaintiff against the said defendant in this behalf, [or, if in *C. P.* or if by original, say, "next before the commencement of this suit,"] in manner and form as the said plaintiff hath above thereof complained against him the said defendant, And this, &c. [*Conclude with a verification, as ante, 907, sixth precedent.*]

STATUTE OF  
LIMITA-  
TIONS.

[*Actio non, as ante, 906.*—Because he saith, that the said plaintiff, before and at the time of the exhibiting of the bill of the said plaintiff, against the said defendant in this behalf, to wit, at, &c. (*venue*) aforesaid, was, and from thence hitherto hath been, and still is, indebted to the said defendant, in the sum of £— (*state enough*) of like lawful money of Great Britain, for, &c. [*Here state the subject-matter of the set-off, as in *assumpsit*, as ante, 931, &c.*] Which said sum of money, so due and owing from the said plaintiff to the said defendant, exceeds the supposed debt due and owing from the said defendant to the said plaintiff, and the damages sustained by the said plaintiff by reason of the detention of the said supposed debt, so alleged to be due and owing to the said plaintiff, as in the said declaration mentioned, and out of which said sum of money, so due and owing from the said plaintiff to the said defendant, he the said defendant is ready and willing, and hereby offers to set-off and allow to the said plaintiff, the full amount of the said supposed debt and damages, according to the form of the Statute in such case made and provided, and this he the said defendant is ready to verify, &c.—[*Conclude with verification, as ante, 906.*]

SET-OFF.  
Set-off to  
debt on a  
deed or  
simple  
contract  
(d).

The forms of the pleas of *plene administravit*, of *retainer*, &c. in *assumpsit*, together with the notes, ante, 943 to 950, will be here applicable, see forms, post, 971, to actions on bonds; and see also *Com. Dig. Pleader, 2 D. 9.* To debt on simple contract, or on bond or other specialty, these general pleas are sufficient, but it has been decided, that to debt upon a record, it must be shown in the plea how the defendant administered, &c. see 1 *Ld. Raym.* 3.—*Aleyn*, 48, *sed. quare.* In a plea of *plene administravit prator*, "whereby he could or might pay or satisfy the debt aforesaid, or any part thereof. And this, &c."—[*See forms, 5 Went.* 387.—*7 Wentw.* 362. 460.]

BY AND  
AGAINST  
EXECU-  
TORS AND  
ADMINIS-  
TRATORS.

\*[*First plea, nil debet, as ante, 951; second plea, actio non, as ante, 906, third precedent.*—Because he says, that the said judgment and commitment in execution in the [first] count of the said declaration, and the judgment and commitment in execution in the second count of the said declaration mentioned, are one and the same judgment and commitment, and not divers or different judgments and commitments, and that the supposed escape in the said first count, and the supposed escape, in the said second count mentioned, are one and the same escape, and

[\*957]  
ON LEGAL  
LIABILI-  
TIES.

Plea to  
debt for  
escape  
from exe-  
cution  
against  
marshal or  
warden  
fresh suit,  
and recapi-  
tion (e).

(d) As to the plea of set-off in general, see *ante*, 961. To debt on a bond, with a penalty, the plea is more special, see form, post, 983, and notes.

(e) See other forms, 5 *Wentw.* 228.—2 *T.* 2. 126.—1 *B. & P.* 418; where see the form of replication, rejoinder, and evidence. It is not necessary, in the pleas, to traverse a vol-

untary escape, though there is an authority against this position, 1 *Saund.* 35, n. 1. The statute 8 & 9 *W. 3* c. 27, s. 6, renders necessary an affidavit of the defendant, that the prisoner escaped without his knowledge, 1 *Saund.* 35, note 1. See form of affidavit, post, 961 c. See replications to these pleas, post, 1170.

FOR  
ESCAPES.

[ \*958 ]

not divers or different escapes, and that after the said commitment of the said J. S. to the custody of the said defendant, in execution as aforesaid, to wit, on the said, &c. at, &c. (*venue*) aforesaid, the said J. S. forcibly, and without the knowledge, consent, or permission of the said defendant, and against his will, escaped from and out of the custody of him the said defendant, as such marshal as aforesaid, and fled to places to him the said defendant unknown, and that upon the said escape of him the said J. S., to wit, at, &c. (*venue*) he the said defendant made fresh and close pursuit after the said J. S. in order to retake him, and did continue such pursuit from thence until he the said defendant, afterwards, and before the exhibiting the bill of the said plaintiff against him the said defendant in this behalf, to wit, on, &c. last aforesaid, at, &c. (*venue*) aforesaid, retook the said J. S. upon that pursuit, and again had and detained, and hath from thence hitherto (*f*) always kept and detained, and doth keep and detain him the said J. S. in the custody of him the said defendant, in execution at the suit of the said plaintiff, for the said damages, costs, and charges, so by him recovered as aforesaid, by virtue of the said commitment of him the said J. S. in execution as aforesaid, to wit, at, &c. aforesaid, which said escape, in this plea mentioned, is the same escape whereof the said plaintiff hath above complained against him. And this, &c.—[ *Conclude with a verification, as ante, 907, sixth form.* ]

Plea to action for escape, that defendant forcibly escaped, but has since returned (*g*).

[ *Third plea, actio non, as ante, 906, third precedent.* ]—Because he says, that the said judgment and commitment in execution, in the first count of the declaration mentioned, and the judgment and execution in the said second count of the said declaration mentioned, are one and the same judgment and execution, and not divers or different judgments and commitments, and that the said supposed escape in the said first count, and the said supposed escape in the said second count of the said declaration mentioned, are one and the same escape, and not divers or different escapes; and that after the said commitment of the said J. S. to the custody of him the said defendant, in execution as aforesaid, to wit, on, &c. aforesaid, to wit, &c. (*venue*) aforesaid, he the said J. S. wrongfully, privily, and without the knowledge, permission, or consent of the said defendant, escaped from and out of the custody of the said defendant, as such marshal as aforesaid, to places to him the said defendant unknown; but the said defendant in fact further saith, that the said J. S. afterwards, and before the exhibiting of the bill of the said plaintiff, against him the said defendant in this behalf, to wit, on, &c. last aforesaid, at, &c. (*venue*) aforesaid, voluntarily, and of his own accord, returned back again into the custody of him the said defendant, and that he the said defendant did thereupon then and there keep and detain, and always from thence hath hitherto kept and detained, and still doth keep and detain him the said J. S. in the custody of him the said defendant, in execution at the suit of the said plaintiff, under and by virtue of the aforesaid commitment of him the said J. S. in execution as aforesaid, to wit, at, &c. (*venue*) aforesaid, which said escape, in this plea mentioned, is the same escape whereof the

(*f*) See 11 East, 406.

(*g*) See 5 Wentw. 228. This is a good de-

fence to an action for an escape; but it must be pleaded specially, 2 T. R. 126.

said plaintiff hath above complained against the said defendant. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

FOR  
ESCAPES.

[*First plea, general issue, as ante, 951; second plea, actio non, as ante, 906, third form.*].—Because he says, that the said bill of the said plaintiff was filed on, &c. and not before or after; and the said defendant further says, that after the commitment of the said E. F. to the custody of him the said defendant, in execution as aforesaid, to wit, on, &c. at, &c. he the said E. F. wrongfully, privily and without the knowledge of the said defendant, escaped from and out of the custody of the said defendant, as such marshal as aforesaid, to places to the said defendant unknown; but the said defendant further says, that the said E. F. before the said defendant had any notice or knowledge of the said escape, and before the exhibiting of the bill of the said plaintiff against the said defendant in that behalf, to wit, on, &c. aforesaid, at, &c. voluntarily and of his own accord, returned back again into the custody of the said defendant, and that he the said defendant did thereupon then and there keep and detain him the said E. F. in execution as aforesaid, until the said E. F. afterwards, and before the exhibiting of the bill aforesaid, to wit, on, &c. at, &c. (venue) wrongfully, privily, and without the default, knowledge, permission, or consent of the said defendant escaped from and out of the custody of the said defendant, as such marshal as aforesaid, to places to him the said defendant unknown; but the said defendant further says, that afterwards, and before the said defendant had any notice or knowledge of the said escapes, and before the exhibiting of the bill aforesaid, to wit, on, &c. aforesaid, the said E. F. voluntarily and of his own accord returned back again into the custody of the said defendant, as such marshal as aforesaid, and that he the said defendant did thereupon then and there keep and detain, and always from thence hitherto hath kept and detained, and still doth keep and detain the said E. F. in the custody of the said defendant, as such marshal as aforesaid; and the said defendant further saith, that before and at the time when the said bill was filed against the said defendant by the said plaintiff as aforesaid, the said E. F. was in the actual custody of the said defendant, as such marshal as aforesaid, in execution at the suit of the said plaintiff, under and by virtue of the said commitment of the said E. F. in execution as aforesaid, and that he the said defendant had no notice or knowledge of the said escapes or either of them, at any time before the filing of the said bill, to wit, at, &c. (venue) aforesaid, which said escape in this plea first mentioned, is the same escape whereof the said plaintiff hath above complained against the said defendant, and this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

Plea that the prisoner escaped twice, and voluntarily returned, and was in custody at the time of filing the bill.

[ \*959 ]

[*First plea, general issue.*].—And for a further plea in this behalf, as the said supposed escape of the said E. F. in the said first count of the said declaration mentioned, the said defendant, by leave, &c. says [*actio non, as ante, 906,*] because, protesting that he did not permit or suffer the said E. F. to go and escape out of the custody of him the said defendant, being the warden of the said prison of the *Fleet* as aforesaid, at large and abroad, as the said plaintiff hath in the said first count of the said dec-

The like pleas by warden of *Fleet*, that prisoner, being in custody on a tender in discharge.

FOR  
ESCAPER.

of bail, es-  
caped  
without de-  
fendant's  
knowl-  
edge, and  
that he af-  
terwards  
returned  
before ac-  
tion  
brought.  
[ \*960 ]

Plea, that  
prisoner  
having  
broke out  
of prison,  
defendant  
made fresh  
pursuit af-  
ter him,  
and retook  
him (A).

[ \*961 ]

laration alleged, for a plea in this behalf the said defendant says, that the said E. F. at the time of the said escaping out of the custody of him the said defendant, as warden of the said prison of the *Fleet*, in the said first count of the said declaration mentioned, the said E. F. then being in the custody of him the said defendant, upon such surrender in discharge of the bail of him the said E. F. as in the first count of the said declaration mentioned, to wit, on, &c. being the said time in the said first count of the said declaration mentioned, with force and arms privately, secretly, and clandestinely, against the will and without the knowledge of the said defendant "so being the warden of the said prison, broke the said prison, and out of the said prison, and out of the said custody of him the said defendant, as such warden of the said prison as aforesaid, fled and escaped to places to the said defendant unknown, to wit, at, &c. (*venue*) aforesaid. And the said defendant further says, that before the day of exhibiting the bill of the said plaintiff against him the said defendant, and before the said defendant had any notice of the said escape, to wit, on, &c. last aforesaid, at, &c. (*venue*) aforesaid, the said E. F. into the said prison privately, secretly, and clandestinely, and without the knowledge of him the said defendant, returned, and the said E. F. continually and after his return hath been and still is detained by the said defendant in prison, under the custody of him the said defendant, as warden of the said prison of the *Fleet* as aforesaid, by virtue of the said surrender of him the said E. F. in discharge of the bail of him the said E. F. at the suit of the said plaintiff, as in the said first count of the said declaration mentioned, whereof the said plaintiff afterwards, to wit, on, &c. last aforesaid, at, &c. (*venue*) aforesaid, had notice; which is the same escape of the said E. F. out of the custody of him the said defendant, so being warden of the said prison of the *Fleet* as aforesaid, for which the said plaintiff hath above in the said first count of the said declaration complained against him the said defendant; and this, &c. wherefore, &c. And for a further plea in this behalf as to the said escape of the said E. F. in the said first count of the said declaration mentioned, the said defendant by like leave, &c. says, [*actio non*] because protesting, &c. [*as in the first plea*,] for plea in this behalf the said defendant says, that after the surrender of the said E. F. to the custody of him the said defendant, in discharge of the bail of him the said E. F. at the suit of the said plaintiff in the said first count of the said declaration mentioned, to wit, on, &c. aforesaid (the said E. F. then being in the custody of him the said defendant, as such warden of the said prison of the *Fleet* as aforesaid, at the suit of the said plaintiff as aforesaid,) he the said E. F. on, &c. last aforesaid, at, &c. (*venue*) aforesaid, with force and arms, without the license or consent, and against the will of the said defendant, broke the said prison, and out of the said prison, and out of the custody of him the said defendant, as warden of the said prison of the *Fleet* as aforesaid, fled and escaped to places to the said defendant unknown, to wit, at, &c. aforesaid. And the said defendant further says, that immediately after the said escape of the said E. F. to wit, on, &c. last aforesaid, he the said defendant made fresh and diligent pursuit for the retaking of the said E. F. to wit, at, &c. (*venue*)

(A) By 8 & 9 W. 3, c. 27, s. 6, this plea must be specially pleaded.

aforesaid, and that he the said defendant made and continued that pursuit from thence, from place to place, until he the said defendant afterwards, and long before the exhibiting, &c. to wit, on, &c. aforesaid, retook the said E. F. upon that pursuit, to wit, at, &c. aforesaid, and thereupon again had and detained him the said E. F. in prison under the custody of him the said defendant, as warden of the said prison of the *Fleet* as aforesaid, by virtue of the said surrender in discharge of the bail of the said E. F. at the suit of the said plaintiff, as in the said first count of the said declaration is mentioned, and still doth detain the said E. F. in his custody aforesaid, for the cause aforesaid, of which, &c.—[*Conclude with notice to plaintiff, as in last plea (i).*]

FOR  
ESCAPER.

[*Actio non.*]—Because he says, that after the said surrender and commitment of the said E. F. in the said several counts of the said bill of the said plaintiff mentioned, and before the said E. F. was by the said defendant permitted and suffered to go out of his custody at large and abroad wheresoever he would and pleased, and without restraint, as in the said several counts of the said bill is alleged, to wit, on, &c. at, &c. (*venue*) aforesaid, the said plaintiff did consent that the said E. F. should be discharged out of the custody of the said defendant, so being warden of the *Fleet*, as in that behalf is mentioned, as to the said several actions and suits in the said several counts of the said bill mentioned, and whereupon the said E. F. had been committed to the custody of him the said defendant, and did give license to the said defendant to discharge the said E. F. out of the custody of the said defendant as to the said several actions and suits, and permit and suffer him to go out of the custody of him the said defendant at large and abroad wheresoever he would and pleased, and without restraint; and thereupon the said defendant did discharge the said E. F. out of his custody, as to the said several actions and suits, and permit and suffer him to go out of the custody of the said defendant at large and abroad wheresoever he would and pleased, and without restraint; without this that the said defendant did voluntarily, wrongfully, and freely, and without the leave or license of the said plaintiff, permit and suffer the said E. F. to go and escape out of the said custody of the said defendant, so being warden of the said prison of the *Fleet* as aforesaid, in manner and form as the said plaintiff hath above thereof complained against him. And this, &c.—[*Conclude with a verification, as ante, 907.*]

Plea that  
the prisoner  
was discharged  
with the  
plaintiff's  
consent.

[*First plea, general issue, as ante, 951; second plea, actio non, as ante, 951.*]—because he saith, that he permitted and suffered the said T. to go at large out of the said prison, and out of the custody of the said defendant with the license and consent of the said plaintiff for that purpose that he had and obtained, to wit, at &c. aforesaid, without this that he the said defendant did permit and suffer the said T. to escape and go at large out of the said prison, and out of the custody of him the said defendant, without the license and consent, and against the will of the said plaintiff, in manner and form as in the said declaration is alleged in this behalf, and this, &c.—[*Conclude with a verification, as ante, 907, sixth plea.*]

Plea (to  
action  
against  
warden of  
*Fleet*, for  
an escape)  
that plaintiff  
licensed  
prisoner  
to go at  
large.

FOR  
ESCAPES.  
Plea (to  
declaration  
on debt  
against  
marshal,  
for an es-  
cape after  
debtor had  
been com-  
mitted to defend-  
ant's cus-  
tody,) that  
debtor, af-  
ter his com-  
mitment, peti-  
tioned In-  
solvent  
Court for  
his dis-  
charge  
from im-  
prison-  
ment, and  
was re-  
manded at  
the plain-  
tiff's suit  
for nine  
months, at  
the expira-  
tion of  
which de-  
fendant  
discharged  
him (k).

[*First plea, nil debet, as ante, 951; second plea, actio non, as ante, 906, third form.*]—Because he saith, that after the said S. T. had been and was committed and remanded to the custody of the said defendant, as such marshal, as in the said first and second counts mentioned, and whilst he the said S. T. was in the said defendant's said custody, to wit, on the 11th day of July, A. D. 1829, at Westminster aforesaid, the said S. T. filed and exhibited his petition in and to the Court for the Relief of insolvent debtors, pursuant to an act passed in the 7th year of the reign of his late Majesty George the Fourth, intituled, "An Act to amend and consolidate the Laws for the Relief of Insolvent Debtors in England," for his discharge from such imprisonment, and such proceedings were thereupon had in the matter of the said petition, that afterwards, to wit, on the 6th day of January, in the year of our Lord 1830, aforesaid, by a certain order of the said last-mentioned court, then and there duly made, pursuant to the said Statute, in the matter of the said petition directed to the said marshal, it was ordered and adjudged that the said S. T. should be discharged from the said custody of the said defendant, as such marshal, as to the said detainer of the said plaintiff, at the period of nine calendar months to be computed from the said 11th day of July, then last, to wit, the said 11th day of July, A. D. 1829, being the time of filing the said petition; and that for so discharging him the said S. T. from such custody, as to the said detainer, the said order should be his, the said defendant's sufficient warrant. And it was and is thereby directed, that the said S. T. should be confined, during the period aforesaid, within the walls of the said prison, and not within any rules or Liberties thereof, and thereupon the said defendant kept and detained the said S. T. so then and there being such prisoner as aforesaid, in custody within the walls of the said prison as aforesaid, until the expiration of the said period of nine calendar months; and at the expiration thereof, the said defendant, pursuant to such order of the said court for the relief of insolvent debtors, did discharge the said S. T. so then and there being such prisoner as aforesaid, out of his the said plaintiff's said custody, and suffered and permitted the said S. T. to escape and go at large out of the said prison and out of the custody of the said defendant, wheresoever the said S. T. would, without restraint, as to the said detainer of the said plaintiff, as the said defendant lawfully might for the cause aforesaid, which is the said supposed escape, in the said first count mentioned; and whereof the said plaintiff hath above thereof complained against the said defendant. And the said defendant further saith that he kept and detained the said S. T. in the custody of him the said defendant, as such marshal, in execution upon and by virtue of the said judgment, in the said declaration mentioned, continually, from the time the said S. T. was committed and first came to the said custody of the said defendant as aforesaid, until the said S. T. was entitled to be discharged and was discharged out of such custody of the said defendant, by virtue and in pursuance of the said order of the said court for the relief of insolvent debtors, and he the said defendant is ready to verify, wherofor

(k) Mr. Campbell and Mr. Chitty thought this a good defense, and under plea of *nil debet*; but thought it better to plead specially in order to compel the plaintiff to reply specially; that after the debtor petitioned for his discharge, he applied for and obtained the

benefit of the Lord's Act, and received his absconce, and which Mr. Campbell and Mr. Chitty considered did not affect the marshal's right to discharge the debtor at the expiration of the nine months.

he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

FOR  
ESCAPES.

In the King's Bench.

Between

{ T. A. - - - - - Plaintiff,  
and  
B. T. esq. - - - - - Defendant.

B. T. of, &c. esq. the defendant in the above cause, maketh oath and saith, that if J. S. the prisoner, for whose escape this deponent is sued at the suit of the plaintiff in the above cause, did, in fact, make such escape, be the said J. S. did make such escape without the consent, privity, or knowledge of him this deponent.

Sworn, &c.

B. T.

Affidavit on 8 & 9 W. 3. c. 27, s. 6, by marshal of the Bench, or warden of the Fleet, &c. that the escape for which he is sued was without his knowledge (1).

[First plea, non est factum, as ante, 952; second plea, actio non, as ante, 906.]—Because he says that the said supposed indenture, in the said declaration mentioned, is not, nor ever was, in the possession of the said defendant in manner and form as the said plaintiff hath in his said declaration above alleged; and of this the said defendant puts himself upon the country, &c.—[Third plea.]—And the said defendant by like leave of the court, &c. says, that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, without producing and bringing into court the said supposed indenture, in the said declaration mentioned, because he saith, that the said supposed indenture, in the said declaration mentioned, is not, nor ever was, in the possession of the said defendant, in manner and form as the said plaintiff hath in his said declaration above alleged. And of this he also puts himself upon the country, &c.

[\*962] ON SPECIALTIES. Pleas to a declaration on a deed stating it to be in possession of defendant, denying that it is so (m).

[First plea, non est factum, as ante, 952; second plea, by leave, &c. and onerari non, as ante, 964, 5.]—Because he says, that the said writing, in the said declaration mentioned, was made by the said defendant, &c. aforesaid, to secure the repayment of a certain sum of money then lent by the said plaintiff to one E. F. and delivered by the said defendant to one G. H. (o) as an escrow to be kept by him on this special condition, that is to say, that (p) [if the said E. F. should, within the space of — months then next following, secure the re-payment of the said

ESCROW. Delivery of the bond as an escrow (h).

(1) See 1 Saund. 35, n. 1. This affidavit, by the above statute is absolutely necessary to support the plea, and if the plea be filed with such affidavit, it may be treated as a nullity. See, as to form of affidavit, 2 Bla. Rep. 1060.

(m) As to profits, see ante, 439.

(n) As to this plea in general, see Com. Dig. Pleader, 2 W. 18, and Falt, A. 8.—4 Rest. 91, 96. 8 Salk. 120. Delivery as an escrow may be given in evidence under the plea of non est factum, 4 Esp. Rep. 255.—1 Bel. Abr. 688. 1. 5.—Sir T. Raym. 197. See forms in 7 Wentw. Index, 591, 5, 6.—Rest. Ent. 181 b 182 a.—Lil. Ent. 186.—2 Rich. C. P. 39. Sometimes they commence with the allegation, actio non, but as the validity of the deed is disputed, onerari non appears more correct. See the precedents, Rest. Ent. 181 b. 182 a.—Co. Ent.

145 b. It is said, that as the plea in effect denies the allegation that the defendant made his deed, the plea should conclude to the country, 1 Salk. 274.—Ld. Raym. 808; and so do many of the precedents, Rest. Ent. 181 b 182 a. Co. Ent. 145 b, and see the precedents in Lil. Ent. 186.—2 Rich. C. P. 39. The deed of a corporation needs no delivery, 9 East, 360. As to what is an escrow, see 4 B. & A. 440.—2 B. & C. 85.

(o) The plea must, it seems, state to whom the bond was delivered, 5 Bac. Ab. 160. Obligation, C. It is no escrow if delivered to the obligee, *semb.* id.—Hob. 246.—Ventr. 9.

(p) The following statement must necessarily be according to the facts in each particular case.

ESCROW.

sum of money to the said plaintiff, by a mortgage upon a certain freehold premises of the said E. F. situate at, &c.] that then and in that case the said writing obligatory should be immediately discharged, annulled, and held for nothing, and returned and re-delivered to the said defendant; but that [in default of the said E. F. so securing the repayment of the said sum of money to the said plaintiff by such mortgage aforesaid, within the aforesaid time] then the said writing obligatory of the said defendant should stand and be against him in full force; and the said defendant further says, that within the space of — months from the time of the making and delivering of the said writing as an escrow to the said G. H. as aforesaid, for the purpose aforesaid, to wit, on the — day of —, A. D. —, at, &c. (*venue*) aforesaid the said E. F. did secure the repayment of the said sum of money to the said plaintiff, by a mortgage upon the said freehold premises of him the said E. F. which said mortgage the said plaintiff then and there accepted and received as a security for the repayment of the said sum of money so by him lent to the said E. F. as aforesaid; whereby the said writing of the said defendant so delivered to the said G. H. became and was wholly discharged, annulled, and vacated; and so the said defendant saith, that the said writing is not his deed and of this he puts himself upon the country, &c. (*q*).

FRAUD.  
Deed obtained by fraud (*r*).  
(1).

[*\*963*] [First, *non est factum*; second, and for a further plea, &c. *onerari non, as ante*, 954.]—Because he says, that the said writing, in the said declaration mentioned, was obtained from the said defendant by the said plaintiff (and others in collusion with him) by fraud, covin, and misrepresentation, that is to say, by the said plaintiff (and others in collusion with him) falsely and fraudulently representing to the said defendant, that, &c. [*here state the fraudulent representations, and that the deed was executed in confidence of such misrepresentations, and conclude as follows*,] to wit, at, &c. (*venue*) aforesaid, wherefore he the said defendant saith, that the said writing, in the said declaration mentioned, was [*\*964*] and is void in law, and this he the said defendant is ready to verify, wherefore he prays judgment if he ought to be charged with the said debt by virtue of the said writing, &c.—[Add a plea of fraud and covin generally, omitting the statement of the particular misrepresentations.]

(*q*) As to the conclusion, see *ante*, 962, n. (*o*), and *Rast. Ent.* 181 b. 182 a.—*Co. Ent.* 145 b.—2 *Rich. C. P.* 39.—*Ld. Raym.* 808.—5 *Bac. Ab.* 160. Obligation, C.  
(*r*) Fraud is a defense at law, 2 *T. R.* 765.—3 *T. R.* 48; but not when both parties are implicated, 2 *B. & A.* 370. This general plea

suffices, 2 *M. & S.* 378.—9 *Co.* 110. Fraud may be given in evidence under the general issue, and so may any thing that avoids the deed at common law, *ab initio*, 5 *Co.* 119.—3 *Wills.* 341, 347; but see 2 *Stark.* 35.—2 *Chil. Rep.* 334.

(1) This precedent, as has been well remarked, is not only unsupported by any authority—but it is not found in any other book of entries, (6 *Munf.* 364.) The cases in the note (*b*) by no means warrant the conclusion attempted to be drawn from them. In a court of Law, fraud may be given in evidence to vacate a deed upon the plea of *non est factum*; but it must be such fraud as relates to the execution of the instrument,—as if it be misread to the party, or his signature be obtained to an instrument he did not intend to sign. *Taylor v. King*, 6 *Munf.* 358.—*Durr v. Munsell*, 13 *Johns* 430.—*Fraochot v. Leach*, 5 *Cow.* 506. Therefore, if a defendant plead, that he was induced to give a bond by a fraudulent misrepresentation, the plea will be bad upon demurrer, *Durr v. Munsell*, *Wythe v. Macklin*, 2 *Rand.* 426. Such a plea would be good in *Pennsylvania*, or the defendant might plead *payment*, and give notice of the special matter which constituted the fraud, &c. but it would still be considered as a merely equitable defense, permitted at law, to prevent a failure of justice, there being no courts of Equity in the State. See *Stubbs' Adm. v. King*, 14 *Serg. & Rawle*, 208, decided since the first appearance of this note in the fourth American Edition of this work. See also 2 *Pick.* 196.



[*First plea, general issue, non est factum as ante, 952; secondly, and for a further plea, &c. onerari non, as ante, 954.*].—Because he says, that the said plaintiff, just before the making of the said writing, in the said declaration mentioned, to wit, on the said — day of —, A. D. — aforesaid, at, &c. aforesaid, menaced and threatened the life of the said defendant, unless the said defendant would make and seal, and as his act and deed deliver the said writing (or indenture, or articles) in the said declaration mentioned; and the said defendant did thereupon then and there, by reason and in consequence of such menaces and threats, and in fear and apprehension thereof, make and seal, and as his act and deed deliver the said writing. And this, &c.—[*Conclude with a verification, and onerari non, as ante, 955.*]

**DURESS.**  
1st. Menace to kill (c).

[*Add for a further plea, by leave, &c. onerari non, as ante, 954.*].—Because he says, that the said plaintiff, just before the making of the said writing in the said declaration mentioned, to wit, on the said — day of —, A. D. — aforesaid, at &c. (*venue*) aforesaid, assaulted, beat, bruised, and wounded the said defendant, and then and there menaced and threatened further to beat, bruise, and wound the said defendant, unless the said defendant would make and seal, and as his act and deed deliver the said writing in the said declaration mentioned; and the said defendant did thereupon then and there, for and through fear and apprehension of losing his life, on that occasion make and seal, and as his act and deed deliver the same writing. And this, &c.—[*Conclude as in the former plea.*]

2d. Battery and menace of ther battery, &c.

[*Commencement as in the former plea.*].—Because he says, that the said plaintiff, just before the making of the said writing in the said declaration mentioned, to wit, on the said — day of —, A. D. aforesaid, at, &c. (*venue*) aforesaid, assaulted, beat, bruised, and wounded the said defendant, and also then and there menaced and threatened further to beat, bruise, and wound the said defendant unless the said defendant would make and seal, and as his act and deed deliver the said writing in the said declaration mentioned; and the said defendant did then and there, by reason and in consequence of the premises in this plea mentioned, and for fear of further wounding and of mayhem, and on no other account whatsoever, make and seal, and as his act and deed deliver the said writing. And this, &c.—[*Conclude as in a former precedent.*]

3d. Battery and fear of mayhem.

\*[*Commencement as in former plea.*].—Because he says, that he the said defendant, at the time of making of the said writing, to wit, on the said — day of —, A. D. — aforesaid, at, &c. (*venue*) aforesaid, was unlawfully imprisoned by the said plaintiff (and others in collusion with him,) and then and there detained in prison, until by the force and duress of imprisonment of him the said defendant, he made the said writing, and delivered the same to the said plaintiff as his deed. And this, &c.—[*Conclude as in former precedent.—A plea that a deed was obtained by fraud and covin was added, as ante, 963.*]

4th. Duress of imprisonment (d).

[ '965 ]

(a) See Com. Dig. Pleader, 2 W. 19.—Chit. Contr. 54.

lawful, or it would be no duress, 2 Inst. 482. In equity, see 1 Atk. 409.

(b) The imprisonment must have been un-

INFANCY.  
Infancy to  
debt on  
bond or  
deed (u).

C. D. }

ats.

A. B. }

[*Onerari non, as ante, 954.*]—Because he says, that he the said defendant, at the time of the making of the said writing, was an infant within the age of twenty-one years, to wit, of the age of — (w) years to wit, at, &c. (*venue*) aforesaid. And this, &c.—[*Conclude with a verification, and onerari non, as ante, 955.*]

\*966 ]

COVER-  
TURE.

Coverture  
to debt on  
bond or  
deed (z).

C. D. }

ats.

A. B. }

\*[*Onerari non, as ante, 954.*]—Because she saith, that at the time of the making of the said writing, she was and still is the wife of one E. F. to wit, at, &c. (*venue*) aforesaid. And this, &c.—[*Conclude with a verification, and onerari non, as ante, 955.*]

USURY.

Usury to  
debt on  
bond (y).

[*First plea, non est factum, after craving oyer of the bond and condition, as ante, 953. Second plea, by leave, &c. and onerari non, as ante, 954.*]

—Because he saith, that before the making of the said writing in the said declaration mentioned, to wit, on the said — day of —, A. D. —, aforesaid, it was corruptly (z), and against the form of the Statute in that case made and provided (a), agreed by and between the said plaintiff and the said defendant, that the said plaintiff should lend and advance unto the said defendant the sum of [£46.] of lawful money of Great Britain, and that the said plaintiff should forbear and give day of payment (b) thereof to the said defendant, until and upon the — day of —, A. D. —, then next ensuing, and that the said defendant for the loan of the said sum of [£46.] and for giving day of payment thereof as aforesaid, for the time aforesaid, should give and pay to the said plaintiff on the said — day of —, A. D. —, aforesaid, then next ensuing, more than lawful interest at and after the rate of £5 per centum per annum on the said sum of [£46] that is to say, the sum of [£4.] of like lawful money, making together, with the said sum of [£46,] so to be lent and advanced by the

(u) See the forms, Rast. Ent. 163 a.—Bro. Rep. 176.—Morg. 634.—Plead. A. 452.—1 Rich. C. P. 154. If the defendant be *still* an infant, he must plead by guardian, and not by attorney, ante, 909 b. n. y. In an action upon a deed infancy must be pleaded specially, 3 Burr. 1805. Com. Dig. Pleader, 2 W. 22.—5 Co. 119 a.—Gilb. Debt, 487.—2 Salk. 675.—1 Ld. Raym. 315, S. C.—sed vide 1 Salk. 279.—3 Burr. 6794.—3 Taunt 307.—3 M. & S. 377.—2 Hen. Bla 515.—2 Stark. 36.—6 Moore, 488. Tidd's Prao. 9th edit. 650, 651; but in assumpsit it may be given in evidence under the general issue, ante, 909. See the form of plea to debt on simple contract, ante, 956.

Lunacy may be given in evidence under *non est factum*, 2 Stra. 1104.—*Sed vide* 2 Salk. 675.

(w) The precise age here stated is not material. (x) See the notes to the precedent, ante, 966. Com. Dig. Pleader, 2 W. 21, and precedent of plea of coverture to debt on simple contract. If the defendant be *still* a feme covert, she must plead in person, and not by attorney, ante, 899 a, n. Coverture at the time of the executing the deed, may be either pleaded specially, or may be given in evidence under the general issue *non est factum*, 3 Burr. 1805.—12 Mod. 101.—2 Stra. 1104.

Com. Dig. Pleader, 2 W. 18.—2 Campb. 272.

(y) Usury must be pleaded. 2 Stra. 498.—Saund. 295 a. As to this plea in general, see Com. Dig. Pleader, 2 W. 28.—1 Saund. 295 a. b. and the forms, 2 Rich. C. P. 35, 65.—Morg. 226, 634.—Plead. Assist. 450.—Lil. Ent. 118, 183, 184, and other forms indexed in 7 Went. 628 to 631, and a plea of usury in assumpsit, ante, 909 a. In a plea, the usurious agreement must be stated precisely and fully according to the facts. 3 T. R. 538.—2 M. & S. 377.—2 Show, 329.—3 Mod. 85.—6 T. R. 267.—4 Taunt. 810, and if pleaded generally the plea will be bad on demurrer, 2 M. & S. 278. But the objection is cured by the plaintiff pleading over, 1 Campb. 166, in notes. As to what is usury, see 3 Chit. Com. Law, 88, &c.—1 Chit. Coll. Stat. tit. "*Usury*," and see also forms of declarations for usury, and notes, ante 512, which may be useful in framing a plea.

(z) The plea must allege that it was corruptly agreed, 3 Mod 85.—2 Show. 329.

(a) 12 Ann. stat. 2. c. 16. It is not necessary to recite the statute, Bro. Vade Mec. 256. Com. Dig. Pleader, 2 W. 28.

(b) The defendant must expressly aver that the agreement was for giving day of payment, &c. Sir W. Jones, 410.

said plaintiff to the said defendant as aforesaid, the \*said sum of [£50,] in the said condition mentioned, and also that the said defendant should pay to the said plaintiff, interest on the said sum of [£50,] from the — day of —, A. D. —, aforesaid, until the time of the payment of the said sum of [£50,] in the said condition mentioned, and that for securing the payment of the said sum of [£50,] with interest for the same as aforesaid to the said plaintiff, he the said defendant should make and seal, and as his act and deed deliver to the said plaintiff, a certain writing obligatory, and should thereby bind himself in the penal sum of [£100,] conditioned for the payment of the said sum of [£50,] by the said defendant unto the said plaintiff, on the said — day of —, A. D. —, aforesaid, then next ensuing, with interest for the said sum of [£50,] in the mean time, as aforesaid, to be paid quarterly, to wit, at, &c. (*venue*) aforesaid. And the said defendant in fact further saith, that in pursuance of the said corrupt and unlawful agreement so made as aforesaid, the said plaintiff afterwards, to wit, on the said — day of —, A. D. — (*c*), aforesaid, to wit, at, &c. (*venue*) aforesaid, lent and advanced to the said defendant the said sum of [£46,] and that for the securing the repayment thereof, together with the said sum of [£4,] so to be paid and given to the said plaintiff as aforesaid, for the purpose aforesaid, on the said — day of —, A. D. —, aforesaid, then next ensuing, with interest in the mean time, as aforesaid, to be paid quarterly, as well for the said sum of [£46,] so lent and advanced as aforesaid, as for the said sum of [£4,] so to be given and paid to the said plaintiff as aforesaid, for the purpose aforesaid, making together the sum of [£50,] as aforesaid, the said defendant, in further pursuance of the said corrupt and unlawful agreement, then and there, to wit, on the said — day of —, A. D. —, aforesaid, at, &c. (*venue*) aforesaid, made and sealed, and as his act and deed delivered to the said plaintiff, the said writing in the said declaration mentioned, and the said plaintiff then and there accepted and received the said writing with the said condition thereunder written, of and from the said defendant in pursuance of the said corrupt and unlawful agreement, and for the purpose aforesaid. And the said defendant avers, that the said sum of [£4,] so as aforesaid agreed to be given and paid to the said plaintiff for the purpose aforesaid, and the interest of the said sum of [£50,] so reserved and made payable to the said plaintiff, by the said condition of the said writing as aforesaid, exceeds the rate of £5, for the bearing and giving day of payment of £100, for one year, contrary to the form of the Statute in such case made and provided, by means whereof, and by force of the said Statute, the said writing was and is wholly void in law. And this, &c.—[*Conclude with a verification, and onerari non, as ante, 955.*]

USURY.

[\*968]

[*First plea, non est factum, after craving oyer of the bond and condition, as ante, 953, second plea, onerari non, as ante, 954.*—Because he says, that before the making of the said writing in the said declaration mentioned, and after the making of a certain act of parliament, passed in the parliament of our late sovereign lord George the Second, in the 7th

(a) The day on which the money is averred to have been advanced on an usurious contract is material. 4 Esp. Rep. 152.—Campb. 445—R. & M. C. N. P.—Ante, 922

(a) See another form, 2 B & Cres. 573.—see a form in debt for penalties, ante, 516.—see also pleas of, in Covenant, post.—See the Statutes and law in 1 Chit. Col. Stat. tit. "Stock-Jobbing."

STOCK  
JOBGING.  
That bond was given for settling differences, against provisions in Stock-jobbing Act, 7 Geo. 2. c. 8 (1).

STOCK  
JOBBER

form of the Statute, &c. agreed by and between the said defendant and the said plaintiff, that the said defendant should, for securing the repayment of the said differences, make and seal, and as his act and deed, deliver to the said plaintiff the said writing in the said declaration mentioned. And the said defendant further says that the said writing, in the said declaration mentioned, was made and sealed, and delivered by the said defendant to the said plaintiff, on the terms aforesaid, whereby the said writing obligatory was and is void. And this, &c.—[*Conclude with a verification, as ante, 955.*]

SET-OFF.  
Set-off to  
debt on  
bond (e).

C. D. }  
ats. } [ *Actio non, after craving oyer, as ante, 953.* ]—Because he says, A. B. } that at the time of the exhibiting of the bill of the said plaintiff against the said defendant in this behalf, (or, *if in C. P. or by original*, “at the time of the commencement of this suit”) there was due and owing from the said defendant to the said plaintiff, upon the said \*writing obligatory, by the said condition thereof, for the principal and interest in the said condition mentioned, a certain sum of money, to wit, the sum of £—, to wit, at, &c. (*venue*) aforesaid. And the said defendant further says, that the said plaintiff, before and at the time of the exhibiting of the said bill, (or, *if in C. P. or by original*, “before and at the time of the commencement of this suit”) was and still is indebted to the said defendant in a much larger sum of money than the money so due and owing from the said defendant to the said plaintiff, upon the said writing obligatory, that is to say, in the sum of £—, for, &c. [*here state the subject-matter of set-off, as in assumpsit; ante, 933 to 939*] which said sum of money so due and owing from the said plaintiff to the said defendant is wholly unpaid, and exceeds the money so due and owing from the said defendant to the said plaintiff, by virtue of the said condition of the said writing obligatory, and which said sum of money so due and owing from the said plaintiff to the defendant as aforesaid, or so much thereof as shall be necessary in this behalf, he the said defendant is ready and willing, and offers to set-off and allow against the said sum of money so remaining due and payable by the condition of the said writing obligatory, according to the form of the Statute in such case made and provided. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

Plea to an  
action on  
two bonds  
of set-off  
on two  
bonds given  
by  
plaintiff to  
defendant.

[*Actio non, as ante, 953.* ]—Because he says, that the said writing obligatory, in the first count of the said declaration mentioned, was and is conditioned for the payment of the sum of £— of lawful, &c. and interest for the same, by the said defendant to the said plaintiff, on a certain day now past, and that at the time of suing forth the original writ of the said plaintiff, [or, *if in K. B.* “at the time of the exhibiting the bill of the said plaintiff, against the said defendant”] in this behalf, there was due and

(e) See the forms, ante, 931 to 939.—2 Rich. C. P. 29, 30, 1.—5 Wentw. 484. 7 Wentw. 589, 590, 591, &c. When either of the debts accrued by reason of a penalty, the debt intended to be set-off must be pleaded, and the defendant cannot give notice of set-off, 8 Geo. 2, c. 24, s. 5, and by the same statute, in a plea of set-off to an action on a bond, the defendant must set forth the

sum really due on the bond, before he is entitled to set-off any cross demand, 6 T. R. 460; and the sum is traversable, though laid under a scilicet, Id. ibid.—3 T. R. 65.—Ante, vol. i. Index, tit. “Set-off.” See the forms indexed, 7 Wentw. 589, 590, 591, &c. The plea of set-off to debt on simple contract nearly resembles those in assumpsit, ante, 931 to 939.

STOCK  
JOBBER.

per centum Consolidated Bank Annuities, and that the same should be transferred by the said J. L. to the said defendant on the [12th] day of [April] in the same year. And the said defendant further saith, that the said J. L. was not, at the time of the making of the said contract and agreement, actually possessed of or entitled unto the said interest or share in the said public stock, so agreed to be sold and transferred by him as last aforesaid in his own name, or in his own right, or in the name or names of a trustee or trustees, to or for his the said J. L.'s use, or his own right, as the said plaintiff then and there well knew, contrary to the form of the Statute in such case made and provided; and thereupon afterwards, to wit, on the said [12th] day of [April] A. D. [1792] aforesaid, at, &c. (*venue*) aforesaid, the said plaintiff did then and there, for and on the behalf, and as agent of the said defendant, voluntarily pay, from and out of his own monies, a certain sum of money, to wit, the sum of [£80] to the said J. L. for the compounding, satisfying, and making up a certain difference, for his the said defendant's not receiving the said last-mentioned interest or share in the said public stock, and for the not performing of the said last-mentioned contract and agreement, the same stock then and there not being any public or joint stock, or other public security, bought by the said defendant or the said plaintiff, or any other person or persons, to be delivered, accepted, or paid for on a future day, and which had been or was refused or neglected to be transferred, and the said difference or sum of [£80,] then and there not being recovered or received by the said J. L. or any other person or persons, being the person or persons who first contracted to sell or deliver such public or joint stock, or other securities, as the damage which had been sustained, by reason of the not delivering, or not transferring such stock or other securities by the said plaintiff, or any other person or persons, contrary to the form of the Statute, &c. And the said defendant further saith, that for the purpose (amongst other things) of securing to the said plaintiff the re-payment to him by the said defendant, of the said difference so paid as last aforesaid, the said defendant, on the said — day of —, A. D. — aforesaid, made and sealed, and as his act and deed delivered to the said plaintiff the said writing in the said declaration mentioned, and the said plaintiff then and there accepted and received the same of and from the said defendant, upon and for the consideration, and for the purpose last aforesaid, contrary to the form of the Statute, &c. And this, &c.—[*Conclude with a verification, as ante, 955.*]

And for a further plea, &c.—[*Onerari non, as ante, 954.*] Because he Third plea. says, that before the making of the said supposed writing obligatory, to wit, on, &c. the said plaintiff had, contrary to the Statute, &c. negotiated the payment of, and had paid for, and on the account of the said defendant a large sum of money, to wit, the sum of [£4574. 5s.] for certain differences by the said plaintiff, for and on the behalf of the said defendant, bargained for, and agreed to be paid by the said defendant for and on account of certain unlawful wages and contracts, touching and relating to the stocks and public funds, to wit, the 3 per cent. consols, in lieu and instead of accepting and paying for transfers of such stock to him from the vendors thereof; and thereupon it was then and there corruptly and unlawfully, against the

STOCK  
JOHNSON

form of the Statute, &c. agreed by and between the said defendant and the said plaintiff, that the said defendant should, for securing the re-payment of the said differences, make and seal, and as his act and deed, deliver to the said plaintiff the said writing in the said declaration mentioned. And the said defendant further says that the said writing, in the said declaration mentioned, was made and sealed, and delivered by the said defendant to the said plaintiff, on the terms aforesaid, whereby the said writing obligatory was and is void. And this, &c.—[*Conclude with a verification, as ante, 955.*]

SET-OFF.  
Set-off to  
debt on  
bond (c).

C. D. }

ats. } [*Actio non, after craving oyer, as ante, 953.*]—Because he says, A. B. } that at the time of the exhibiting of the bill of the said plaintiff against the said defendant in this behalf, (or, *if in C. P. or by original*, “at the time of the commencement of this suit”) there was due and owing [ \*969 ] from the said defendant to the said plaintiff, upon the said \*writing obligatory, by the said condition thereof, for the principal and interest in the said condition mentioned, a certain sum of money, to wit, the sum of £—, to wit, at, &c. (*venue*) aforesaid. And the said defendant further says, that the said plaintiff, before and at the time of the exhibiting of the said bill, (or, *if in C. P. or by original*, “before and at the time of the commencement of this suit”) was and still is indebted to the said defendant in a much larger sum of money than the money so due and owing from the said defendant to the said plaintiff, upon the said writing obligatory, that is to say, in the sum of £—, for, &c. [*here state the subject-matter of set-off, as in assumptit; ante, 933 to 939*] which said sum of money so due and owing from the said plaintiff to the said defendant is wholly unpaid, and exceeds the money so due and owing from the said defendant to the said plaintiff, by virtue of the said condition of the said writing obligatory, and which said sum of money so due and owing from the said plaintiff to the defendant as aforesaid, or so much thereof as shall be necessary in this behalf, he the said defendant is ready and willing, and offers to set-off and allow against the said sum of money so remaining due and payable by the condition of the said writing obligatory, according to the form of the Statute in such case made and provided. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

Plea to an  
action on  
two bonds  
of set-off  
on two  
bonds giv-  
ing by  
plaintiff to  
defendant.

[*Actio non, as ante, 953.*]—Because he says, that the said writing obligatory, in the first count of the said declaration mentioned, was and is conditioned for the payment of the sum of £— of lawful, &c. and interest for the same, by the said defendant to the said plaintiff, on a certain day now past, and that at the time of suing forth the original writ of the said plaintiff, [or, *if in K. B.* “at the time of the exhibiting the bill of the said plaintiff, against the said defendant”] in this behalf, there was due and

(c) See the forms, ante, 931 to 939.—2 Rich. C. P. 29, 30, 1.—5 Wentw. 484. 7 Wentw. 589, 590, 591, &c. When either of the debts accrued by reason of a *penalty*, the debt intended to be set-off must be *pleaded*, and the defendant cannot give notice of set-off, 8 Geo. 2, c. 24, s. 6, and by the same statute, in a plea of set-off to an action on a bond, the defendant must set forth the

sum really due on the bond, before he is entitled to set-off any cross demand, 6 T. R. 460; and the sum is traversable, though laid under a *scilicet*, Id. *ibid.*—3 T. R. 65.—*Ante*, vol. i. Index, tit. “*Set-off*.” See the forms indexed, 7 Wentw. 589, 590, 591, &c. The plea of set-off to debt on simple contract nearly resembles those in *assumpsit*, ante, 931 to 939.

owing from the said defendant, to the said plaintiff, upon the said last-mentioned writing obligatory, by the condition thereof, for the principal and interest in the said condition mentioned, a certain sum of money, to wit, the sum of £— of like lawful money, and no more, to wit, at, &c. (*venue*) aforesaid. And the said defendant further says, that the said writing obligatory, in the said last count of the said declaration mentioned, was and is conditioned for the payment of the sum of £— of like lawful money, and interest for the same, by \*the said defendant to the said [ \*970 ] plaintiff, on a certain day now past, and at the time of suing forth the original writ of the said plaintiff, [or, “ at the time of exhibiting the bill of the said plaintiff,”] against the said defendant, there was due and owing from the said defendant to the said plaintiff, upon the said last-mentioned writing obligatory, by the condition thereof, for the principal and interest in the said last-mentioned condition specified, a certain other sum of money, to wit, the sum of £— of like lawful money, and no more, to wit, at, &c. (*venue*) aforesaid. And the said defendant further says, that long before the commencement of this suit, to wit, on, &c. at, &c. (*venue*) aforesaid, the said plaintiff, by his certain writing obligatory, sealed with his seal, and now shown to the court here, the date whereof is the same day and year last aforesaid, acknowledged himself to be held and firmly bound unto the said defendant, in the penal sum of £— of good and lawful money of Great Britain, to be paid to the said defendant, when he the said plaintiff should be thereto afterwards requested, which said last-mentioned writing obligatory was and is conditioned for the payment of the sum of £— of like lawful money of Great Britain, together with interest for the same, by the said plaintiff to the said defendant, at a certain day now past, and which said last mentioned writing obligatory still is in full force and effect, not in any wise released, paid off, satisfied, or discharged, to wit, at, &c. (*venue*) aforesaid. And the said defendant further says, that long before the commencement of this suit, to wit, on, &c. aforesaid, at, &c. (*venue*) aforesaid, the said plaintiff, by his certain other writing obligatory, sealed with his seal, and now shown to the court here, the date whereof is the same day, &c. &c. (*as before*.) And the said defendant further says, that at the time of suing forth the said original writ of the said plaintiff, [or, “ at the time of the exhibiting the bill of the said plaintiff against the said defendant,”] there was and still is due and owing, upon the said two last-mentioned writings obligatory, by the respective conditions thereof, for the principal and interest in the said conditions respectively mentioned, a certain sum of money, to wit, the sum of £— of like lawful money, to wit, at, &c. (*venue*) aforesaid; which said last-mentioned sum of money, so due and owing from the said plaintiff to the defendant, greatly exceeds the monies due and owing from the said defendant to the said plaintiff, upon the said writings obligatory in the said declaration mentioned, by the respective conditions thereof, for the principal and interest in the same conditions respectively mentioned, and out of which said sum of money, so due and owing from the said plaintiff to the said defendant, as aforesaid, he the said defendant is ready and willing, and hereby offers to set-off and allow to the said plaintiff, the said monies so due and owing from him the said defendant to the said plaintiff, as aforesaid, according to the form of the Statute in such case

**SET-OFF.** made and provided, and this he the said defendant is ready to verify; wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

**BANKRUPTCY.**  
Bankruptcy of plaintiff.

[\*971]

[See ante, 911, 919.]—To debt on bond or other specialty brought in the name of a bankrupt, as there is no general issue, it is necessary to plead his bankruptcy specially, and the defendant cannot give it in evidence under the general issue non est factum, as in *assumpsit*, see ante, 918. The form of the plea is in 7 *Wentw.* 414.—*Morg.* 230. As to this plea, see 1 *T. R.* 619.—3 *B. & P.* 40. and ante, 918.—15 *East*, 622.—5 *B. & A.* 16. See form of plea of bankruptcy of defendant, ante, 956; of his bankruptcy to debt on bond, 2 *B. & Ald.* 803.

**STATUTE OF LIMITATIONS.**  
Statute of limitations.

As to pleading the statute in debt, see ante, vol. i. 422; and 1 *Saund.* 283, n. 2, 35, 208.—2 *Saund.* 62 c. n. 6. To debt on specialty, there is no plea of the Statute of Limitations, though after the lapse of twenty years, or even less, payment will in general be presumed of a money bond, provided the defendant plead, *solvit ad, or post diem, as post*, 974, 975. See *Tidd's Practice*, 9th edit. 18, 19.—1 *Campb.* 217.

**BY EXECUTORS, HEIRS, &c.**  
Plene administravit before notice of the bond (f).

[*Actio non, as ante*, 906, first precedent, to the asterisk.]—Because he saith, that after the death of the said E. F. and before the said defendant had any notice of the said writing obligatory in the said declaration mentioned, to wit, on, &c. at, &c. (*venue*) aforesaid, he the said defendant had fully administered all and singular the goods and chattels, which were of the said E. F. deceased, at the time of his death, and which have ever come to his hands to be administered; and that he hath not, nor had he, at the time when he first had notice of the said writing obligatory, or at any time afterwards, any goods or chattels, which were of the said E. F. deceased, at the time of his death, in the hands of the said defendant, as executor, as aforesaid, to be administered. And this, &c.—[Conclude with a verification, as ante, 907, sixth form.]

Plea to declaration in debt on bond, by administrator *de bonis non*, against administrator of obligor, that judgment was recovered against defendant on two bonds of intestate's, and plene administravit præter—i. which is insufficient to pay the judgment (g).

[*Actio non, as ante*, 906.]—Because he says, that the said W. earl of F. in his life-time, to wit, on, &c. by his certain writing obligatory, sealed with his seal, and by him then and there duly delivered, acknowledged himself to be held and firmly bound to one J. B. in the sum of £— to be paid to the said J. B. when he the said W. earl of F. should be thereunto afterwards requested, which said writing obligatory, at the time of the death of the said W. earl of F. and of the recovery of the judgment hereafter mentioned, remained in full force and effect, and in no wise annulled, discharged, paid off or satisfied; and the said W. earl of F. also in his life-time, hereto-

(f) This plea is sometimes adopted, but the general plea of *plene administravit*, putting in issue the due administration of the assets will in general suffice. See form of plea of *plene administravit* in *assumpsit* or debt on simple contract, which will answer here, ante, 948, 956.

(g) See forms, 5 *Wentw.* 887.—7 *Wentw.* 469, 862. See pleas in *assumpsit*, ante, 945: In those pleas the foundation of the

Judgment is not shown; but in an action of debt, when on a specialty, it is necessary to show that the debt, on which the judgment was recovered, was a specialty, or to aver that the judgment was recovered before the defendant had notice of the plaintiff's demand, 1 *T. R.* 690; see form of plea of retainer to satisfy a bond debt to defendant, administrator, 6 *T. R.* 550.



fore, to wit, on, &c. at, &c. (*venue*) by his certain writing obligatory, sealed with his seal, and by him then and there duly delivered, acknowledged himself to be held and firmly bound to the said J. B. in the further sum of £— of good and lawful money of Great Britain, to be paid to the said J. B. when he the said W. earl of F. should be thereto afterwards requested, which said last-mentioned writing obligatory, at the time of the death of the said W. earl of F. and of the recovering of the judgment hereafter mentioned, remained in full force and effect, and in no wise annulled, discharged, paid off, or satisfied; and the said two last-mentioned writings obligatory remaining in full force, the said J. B. for recovery of the said several debts, after the death of the said W. earl of F. and after the granting of the said administration, to wit, in Michaelmas Term, in the — year of the reign of our lord the now king, in his said majesty's court, before the king himself, impleaded the said R. earl of F. as the administrator with the will annexed, of all the goods and chattels, right and credits, which were of the said W. earl of F. at the time of his death, in a certain plea of debt for the said sums of £— and £— making together the sum of £— upon the said two last-mentioned writings obligatory, and such proceedings were thereupon had in the same court, that the said J. B. afterwards, to wit, in the same Michaelmas Term, in the — year aforesaid, by the judgment of the same court, recovered against the said R. earl of F. as administrator, with the will annexed as aforesaid, as well the said several debts, &c. amounting, &c. as also the further sum of, &c. for the damages which he had sustained, as well by occasion of the detaining of that debt, as for his costs and charges by him about his suit in that behalf expended to the said J. B. by the court there adjudged, to be levied of the goods and chattels which were of the said W. earl of F. at the time of his death, and which were of the said W. earl of F. to be administered, if he had so much in his hands to be administered, and if he had not so much thereof in his hands to be administered, then the same damages to be levied of the proper goods and chattels of the said R. earl of F.; wherefore the said defendant was convicted, as by the record and proceedings thereof remaining in the said court of our said lord the king, before the king himself at Westminster, more fully appears; which said judgment still remains in full force and unsatisfied; and the said R. earl of F. saith that he hath fully administered all and singular the goods and chattels which were of the said W. earl of F. at the time of his death, which hath come to his hands to be administered, and that he hath not, nor on the day of exhibiting the bill of the said plaintiff, or ever afterwards, had any goods and chattels belonging to the said W. earl of F. at the time of his death, to be administered, except goods and chattels to the amount of £— which are not sufficient to satisfy the said judgment in form aforesaid given, and which are subject and liable to the satisfaction thereof, and this, &c. Wherefore, &c.

[ \*972 ]

—[If the defendant has no assets whatever in hand, add a plea of *plene administravit generally*.]

BY EXECU-  
TORS,  
HEIRS, &c.

BY EXCEU-  
TORA,  
HEIRS, &c.  
Parol de-  
murrer by  
an infant  
heir (h).

C. D. )

ats. }

\*And the said defendant, by E. F. who is admitted by the court A. B. } of our said lord the king here, as guardian (i) of the said defendant, to defend for the said defendant, who is an infant under the age of twenty-one years, comes and defends the wrong and injury, when, &c. and says, that he the said defendant is within the age of twenty-one years, to wit, of the age of — years, to wit, &c. (*venue*) aforesaid, and this he is ready to verify, wherefore he does not suppose that during his minority he ought to answer the said plaintiff in his said plea, and he prays that the said parol may demur, until the full age of him the said defendant, &c.

Rien per  
descent by  
heir (k).

[ \*974 ]

[ *Onerari non, as ante, 954.* ]—Because he saith, that he the said defendant hath not, nor at the time of the exhibiting \*the bill of the said plaintiff, in this behalf, (or, *if in C. P. or by original*, “at the time of the commencement of this suit”) nor at any time before or since, had any lands, tenements, or hereditaments, by descent from his said father, (*or brother, &c. according to the fact,*) in fee simple, and this he is ready to verify, wherefore he prays judgment, if he, as son, (*or brother, &c.*) and heir of the said G. H. deceased, ought to be charged with the said debt by virtue of the said writing obligatory.

Plea by a  
devisee  
rien per  
devise (l).

[ *Onerari non, as ante, 954.* ]—Because he says, that he the said defendant hath not, nor at the time of the exhibiting of the bill of the said plaintiff, in this behalf, (or *if in C. P. or by original*, “at the time of the commencement of this suit”) nor at any time before or since, had any lands, tenements, or hereditaments, by devise from the said E. F. deceased. And this, &c.—[ *Conclude with a verification, and onerari non as ante, 954.* ]

PAYMENT.  
Solvit ad  
diem (m).

C. D. )

ats. }

[ *Actio non, after craving oyer, as ante, 953.* ]—Because he A. B. } says, that he the said defendant, on the said — day of — A. D. — aforesaid, (*the day of payment mentioned in the condition*) is the said condition of the said writing obligatory mentioned, paid to the said plaintiff the said sum of £—, in the said condition mentioned, together with all interest then due thereon, according to the form and effect of the said condition, to wit, at, &c. (*venue*) aforesaid. And this, &c.—[ *Conclude with a verification as ante, 907, sixth precedent.* ]

[ \*975 ]  
Solvit post.

C. D. )

ats. }

[ \*First plea, solvit ad diem, as in the former precedent; see A. B. } only, *actio non, as ante, third precedent.* ]—Because he says

(h) See the forms, 4 East, 485.—1 Went. 43. As to the law, Bac. Ab. Infancy, L.—Com. Dig. Infant, D. and Pleader, 2 E. 8. An infant devisee cannot pray the parol to demur, 4 East, 485.

(i) This is necessary, ante, 909, b, note y.

(k) See the form indexed in 7 Wentw. 603, 4.—Rast. Ent. 172.—2 Rich. C. P. 460.—Plead. A. 364.—Morg. 652.—Lil. Ent. 112; and as to the pleas in general by an heir, see 2 Saund. 7, n. 4.—Com. Dig. Pleader, 2 E. 8.—Bac. Ab. Heir, F. The heir must plead *rien per descent* when he has no assets, or he will be liable personally to the amount of the debt, 3 T R. 685. See a plea of retainer by an heir, 1 T R. 454. As to what are assets by descent, see ante, 468, n and Selw. N. P.

523, n. 65.—2 Saund. 7. As to the plea *rien per descent prater*, a term for life & years, 2 Saund. 7, n. 4.—1 Salk 351.—Wils. 49. See a form of *rien per descent prater*, a rectory, &c. Rast. Ent. 172 b.—Lil. Ent. 180.—5 Mod. 121, 122.

(l) See the forms, 2 Rich. C. P. 38, 2. Went. 603 to 605. The devisee must be sued jointly with the heir, ante, 469, but he should plead separately.

(m) See Com. Dig. Pleader, 2 W. 29. Bac. Ab. 666. See precedent, Morg. 538. As to evidence on, see Tidd's Prac. 9th ed 18, 19. This plea need not be signed in K. B. 5 T R. 661, nor is it the practice to sign it in C. B. *Non est factum* will not, in general, be allowed in C. P. to be pleaded with this plea.

that he the said defendant, after the said — day of — A. D. —, in the said condition mentioned, and before the exhibiting of the bill of the said plaintiff in this behalf, (or, if in *C. P.* or by original, "before the commencement of this suit") to wit, on, &c. at, &c. (*venue*) aforesaid, paid to the said plaintiff the said sum of £—, in the said condition mentioned, together with all interest then due thereon. And this, &c.—  
*Conclude with a verification, as ante, 907, sixth precedent.]*

PAYMENT.

diem (n).

[*First plea, non est factum, after craving oyer of the bond and condition, &c. as ante, 953; second plea, onerari non, as ante, 954.*]—Because he says, that the said writing obligatory was made and entered into by the said defendant to the said plaintiff for a certain pecuniary consideration (o) by him given and paid to the said defendant in that behalf as aforesaid (o) and that no memorial of the said writing obligatory in that point mentioned was enrolled in the High Court of Chancery within thirty days (q) of the execution thereof, according to the directions of a certain act of parliament, made and passed in the 53d year of the reign of his late Majesty George the Third, whereby the said writing in the said declaration mentioned is null and void (r), and this the said defendant is ready

ON ANNUITY DEEDS.

To debt on annuity bond, that no memorial of it whatever, was enrolled, according to 58 Geo. 3, c. 141 (p).

(n) See form, *Morg.* 533, 4, 652.—Pl. A. 1. This plea is given by the stat. 4 Ann. c. 12, to an action of debt, but the statute does not extend to the crown, 1 Price, 28. *Memorial*, a post obit bond is within the stat. 4 Ann. c. 16.—2 B. & A. 82. When executors *ad solvit post diem*, and rely upon the presumption of payment arising from the lapse of time, it is advisable in general to plead *ad solvit post diem*, as well by the testator, as by the executor, in separate pleas, and see Rep. temp. Hardw. 183.—1 Str. 652.—Tidd's 9th ed. 18.

(o) Unless for a pecuniary consideration, the deed need not be enrolled. See the cases fully collected in 1 Chit. Col. Stat. 27, 8, n. If the consideration does not appear in the declaration or deed, set out on oyer to have been pecuniary, it should seem the plea ought to show expressly how the consideration arose, and see form, 4 B. & C. 69.—6 D. & R. 68, S. C. and see 7 East, 529.

(p) See forms, 7 Wentw. 526.—1 East, 3.—3 East, 461.—1 New Rep. 214.—4 T. R. 3.—2 Hen. Bla. 280.—3 T. R. 599.—4 B. & C. 49. The act now in force relating to the relief of annuities granted after the 14th July, 1818, is the 58 G. 3, c. 141, which repeals the 17 G. 3, c. 26, except as to annuities granted before that day. For the construction and decisions to be put upon the 58 G. 3, c. 141, see fully the notes in 1 Chit. Col. Stat. tit. "Annuity," p. 23 to 28. The circumstances of the 58 Geo. 3, s. 5, introducing power to the grantor to enforce the delivery of copies of the original deeds, and thereby to obtain full information of the transaction, has induced the courts to require less particularity in the memorial than was essential under the 17 Geo. 3, c. 26.—6 B. & C. 371. The form of the memorial is given in the 53 Geo. 3, c. 141. If a memorial has in fact been enrolled, but not properly so, then the next plea should be added, pointing out the objection to the

memorial, and such objection should be stated according to the fact, and so that there be no *departure* from it in the rejoinder. Thus, in 4 T. R. 585, and 2 Hen. Bla. 280, where to an action of debt on a bond given to secure an annuity, the defendant pleaded that *no such memorial was enrolled*, as required by the statute, and the replication stated that a memorial was enrolled, containing the particulars which the statute directs, and the rejoinder alleged that the memorial in the replication mentioned, did not truly set forth the consideration on which the annuity was granted; it was held, that this was clearly a *departure* from the plea, see also 2 Saund. 188 to 188, but see 11 East, 188. A plea, stating a defective memorial, should show that there was no other enrolled. 1 Marsh. 155.—1 New Rep. 214.

(q) A memorial, enrolled within thirty days after execution of the deed by the grantee, is good, though before execution by the grantor, 10 Moore, 28.—3 Bing. 215.—6 B. & C. 49, S. C. in error. And where a trustee executed the deed after enrolment, it was held, that such execution need not be enrolled, 1 Stark. C. N. P. 481.

(r) The omission to memorialize the annuity, though at request of grantor, will still render it void, 2 Chit. Rep. 34. An annuity deed, and every deed &c. by which an annuity is secured, is *absolutely void*, if the memorial be not registered according to the directions of the act, 2 T. R. 603, and if the memorial of a deed be defective, the whole deed is void to all intents, 5 T. R. 641. But where A. purchased an annuity for his life, which was regularly paid up to the time of his death, but no memorial of the grant was enrolled; it was held that A's executrix could not, on that ground, insist that the contract was void, and recover back the consideration-money paid for the annuity, 6 B. & C. 651.

ON ANNUITY DEEDS.

to verify, wherefore he prays judgment if he ought to be charged with the said debt by virtue of the said supposed writing obligatory.—[If a defective memorial has been enrolled, add the following plea.]

No proper memorial enrolled, containing the names of the witnesses, &c. according to 58 Geo. 3, c. 141 (s).

[First plea, *non est factum*, after craving oyer of the deed, as ante, 953; second plea, as last precedent; and for a further plea in this behalf, *onerari non*, as ante, 954.]—Because he says that (t) no memorial of the said writing, containing the names of all the witnesses thereto [or, “of the date of the said deed,” or, “writing, &c.” or, “of the names of all the parties thereto,” or, “of the person or persons for whose life or lives the said annuity (or rent-charge) was granted,” or, “of the person or persons by whom the said annuity was to be beneficially received,” or, “the pecuniary consideration or considerations for granting the said annuity (or “rent-charge,”) or, “the annual sum or sums to be paid thereby,”] was enrolled in the High Court of Chancery, according to the directions of the act of parliament made and passed in the 53d year of the reign of his late Majesty King George the Third, whereby the said writing in the said declaration mentioned, is null and void. And this, &c.—[Conclude with a verification, and *onerari non*, as ante, 954.]

No memorial enrolled within twenty days, according to 17 Geo. 3, c. 28 (u).

[First plea, *non est factum*, after craving oyer of the bond and condition, as ante, 953; and for a further plea, &c. *onerari non*, as ante, 954.]—Because he says, that no memorial of the said writing in the said declaration mentioned, was enrolled in the High Court of Chancery within twenty days of the execution thereof, according to the directions of a certain act of parliament made and passed in the 17th year of the reign of his late Majesty King George the Third [or, if there was a defective memorial, then say, “that no such memorial of the said writing in the said declaration mentioned, as was and is required by the Statute hereinafter mentioned, was enrolled, &c.”] whereby the said writing in the said declaration mentioned is null and void. And this, &c.—[Conclude with a verification, and *onerari non*, as ante, 954. If a defective memorial was enrolled, add the following plea.]

No memorial containing the names of the witnesses enrolled according to 17 Geo. 3, c. 28 (w).

[General issue, and the second plea as in the former precedent; and for a further plea in this behalf, *onerari non*, as ante, 954.]—Because he says, that no memorial of the said writing containing the names of all the witnesses to the execution thereof [or, the day of the month and year when “the said indenture bears date, &c.”] was enrolled in the High Court of Chancery, according to the directions of the said act of Parliament made and passed in the 17th year of his late Majesty King George the Third’s reign, whereby the said writing in the said declaration mentioned is null and void. And this, &c.—[Conclude with a verification, and *onerari non*, as ante, 954.]

Payment of the annuity.

[General issue, *non est factum*, after craving oyer of the bond and condi-

(s) As to what is a sufficient memorial, see 1 Chit. Col. Stat. tit. Annuity, p. 23 to 28, notes. The memorial might be set out in the plea, which was done in 5 B. & A. 445; and see 3 Bing. 215.

(t) If it does not appear from the declaration or deed set out, that the consideration was pecuniary, the fact of its being so, and

how, should be stated, see form, 4 B. & C. 69.—6 D. & R. 68, S. C.

(u) The 17 Geo. 3, c. 26, now only relates to annuities granted before the 14th of July, 1813. See the notes, ante, 975.

(w) As to these pleas, see the notes, ante, 975.

tion as ante, 985 ; and for a further plea, &c. *actio non*, as ante, 906.] —Because he says, that he the said defendant did [here aver the payment of the annuity on the days mentioned in the bond, and which may be as follows :] well and truly pay to the said plaintiff yearly and every year, the said annuity or sum of £— in the said condition mentioned, by four equal quarterly payments in each year, on the several respective days and times, by the said condition of the said writing obligatory, appointed for the payment thereof, according to the form and effect of the said condition, to wit, at, &c. (*venue*) aforesaid. And this, &c.—[Conclude with a verification, as ante, 907, sixth form.]

ON ANNUITY DEEDS.

on the days mentioned in the bond

[First and second plea, as above ; and for a further plea, &c. *actio non*, as ante, 906.]—Because he says, that he the said defendant, after the making of the said writing obligatory, and before the exhibiting the bill of the said plaintiff in this behalf [or, if in C. P. or by original, “before the commencement of this suit,”] to wit, on, &c. at, &c. (*venue*) aforesaid, paid to the said E. F. all and every the sums of money, which had at any time before then become due and owing upon or by virtue of the said writing obligatory, and the said condition thereof, after each of the said several respective sums of money became and were due and owing, under and by virtue of the said writing obligatory, and the condition thereof. And this, &c.—[Conclude with a verification, as ante, 907, sixth form.]

Payment after the days (x).

\*[*Actio non*, after craving oyer of the bond and condition, for the performance of award, as ante, 958.]—Because he says, that the said arbitrators, named in the said condition, did not, nor did any two of them, on or before the said — day of — A. D. — mentioned in the said condition, make any award in writing under their hands, or the hands of any two of them (*this must be according to the averment in the declaration*), of and concerning the premises in the said condition mentioned, and as referred as aforesaid, ready to be delivered to the said parties in difference. And this, &c.—[Conclude with a verification, as ante, 907, sixth form.]

[\*977]

ON ARBITRATION BONDS.

No award made (y).

[*Actio non*, after craving oyer of the bond and condition, as ante, 963.] —Because he says, that after the making of the said writing obligatory, and before the said — day of — A. D. — in the said condition mentioned, to wit, on the — day of — A. D. — at, &c. (*venue*) aforesaid, the said G. H. and J. K. did make their award in writing under their respective hands, of and concerning the premises in the said condition mentioned, and so referred to them as aforesaid, and ready to be delivered to the said parties in difference, and did thereby award, arbitrate, and determine, that, &c. [here set forth the whole of the award without the recitals, and which award directed the plaintiff to perform an

Plea setting forth award, and stating plaintiff's non-performance of a condition precedent (z).

[\*978]

(x) See 4 & 5 Ann. c. 16. s. 12, and Regl. 519.—Ante, vol. I. Index “Payment.”

(y) See forms, 2 Saund. 184.—1 Saund. 68, 184.—2 Rich. C. P. 44.—Morg. 526. This plea will suffice where there was no award whatever, or where there was an award in fact, but upon the face of it was not according to the submission, and therefore, if the plaintiff reply, setting out an award partially, the defendant may rejoin, setting out the whole and the rejoinder will

not be a departure, 11 East, 188; but see 4 T. R. 588. But the better course seems at least to add a plea setting out the defective award, 16 East, 58.—Wats. on Awards, 211, notes.—Post, 978. As to the replication, see 2 Saund. 62 b. If the award appears bad upon the face of the declaration, the defendant may demur.

(z) See form, 18 East, 23.

## ON ARBITRATION BONDS.

*act which constituted a condition* [precedent as by the said award, reference being thereunto had, will more fully appear, which said matters above recited are the whole of the matters by the said award directed to be performed by the said plaintiff and defendant respectively. And the said defendant in fact saith that he the said defendant, at the day in the said award in that behalf directed, to wit, on the said — day of — A. D. — in the said award mentioned, to wit, at, &c. (venue) aforesaid, requested the said plaintiff to, &c. (to perform the act by the award directed to be done by the plaintiff) and to perform the said award in all things on his part and behalf to be performed, and the said defendant was then and there ready and willing, and offered to the said plaintiff to perform the said award in all things on his part to be performed and fulfilled, if the said plaintiff would perform the said award in the several matters and things directed to be performed by him the said plaintiff; but the said plaintiff then and there wholly refused to, &c. [state the plaintiff's non-performance of the condition precedent] and to perform the said award in the several matters and things directed by the said award to be performed on the part and behalf of him the said plaintiff. And this, &c.— [Conclude with a verification, as ante, 907, sixth form.]

## Other pleas to debt on arbitration bonds, &amp;c.

See the forms indexed, 7 Wentw. 611, 12.—13 East, 23.—Morg. Prec. 523. Plead. A. 352.—Caldw. on Arbitration, 335 to 355.—Watson on Awards. Care must be taken to state with precision the ground of defense in the plea. Nil debet would be a bad plea to debt on bond for the performance of an award, and the plea of non est factum only puts in issue the bond of submission.

If there were an award in fact, and the defendant rely upon some defect therein, he should not merely plead that no award was made, because he cannot, under that plea, go into objections to the award in point of law, 4 T. R. 588.—16 East, 39. But see 11 East, 188.—Ante, 977, note b. If there was an award made which appears on the face of the declaration to have been a defective one, the proper course is for defendant to demur. If it requires an averment to show why the award is defective, the plea must be framed accordingly; and where the award may or may not be final or certain, according to intrinsic facts, the defendant should state such facts in his plea, as an award, that expenses already incurred in a suit by the parties were to be allowed as part of a sum of money, to be contributed by each, is certain or not, according to the fact, whether such expenses were or were not a matter in difference; in such case, if the defendant object to the award for uncertainty, he should not set out the award and demur, but plead specially the fact, to show that in this respect the award was uncertain, 3 D. & R. 433.—2 B. & C. 170. If the condition of the bond be, "that the award shall be made and ready to be delivered to the parties, or such of them as shall require it on such a day," if the defendant have requested the arbitrator to deliver the award on that day, and the arbitrator neglect, or refuse so to do, the defendant should not plead "nul agard" only, but should plead specially, that he requested the arbitrators to deliver the award, and they refused so to do, 1 Saund. 827 b. n. 3. So if the defendant rely upon the non-performance by the plaintiff of a condition precedent, or that the award was not ready to be

delivered, he should plead those facts specially, 2 Saund. 188 to 188.—  
2 Saund. 327 b.

ON ARRES-  
TRATION  
BONDS.

As to a plea of performance generally, see the precedent and notes, in 1  
Saund. 824.

Partiality and improper conduct, in an arbitrator in making his award  
without hearing the defendant and his witness, cannot be pleaded in bar [ \*979 ]  
to an action on the bond, conditioned for the performance of the award,  
but is only matter for application to the equitable jurisdiction of the court  
to set aside the award, 8 East, 344.—1 Saund. 327 b; and see 5 B. & C.  
534.—8 D. & R. 295, S. C.

Neither can a parol agreement between the practice to waive and aban-  
don the award be pleaded to such action, 8 East, 344.—1 Saund. 287 a,  
n. 3. 30. 31.

But the omission of the arbitrators to award upon a part of the matter  
in difference may be pleaded, 16 East, 58.—2 B. & C. 170.—3 D. & R.  
433, S. C.

To debt on bond for the performance of an award the defendant cannot  
plead that he revoked the arbitrators' authority, for he would thereby ad-  
mit a breach of the condition of the bond, see 5 Taunt. 325.—8 Rep.  
162.—1 D. & R. 106.—5 B. & A. 507, S. C.

As to the plea of foreign attachment, see *Ld. Raym.* 636.—3 East,  
366, 380.

[*Onerari non*, as ante, 954.]—Because he says, that no writ or process  
whatsoever, whereupon the said plaintiff could and might be arrested and ON RAIL  
held to bail, returnable in the court of our said lord the king, before the BONDS (a).  
king himself (or, in *C. P.* "in the said court of our said lord the king of No process  
the Bench at Westminster,") was sued and prosecuted by and at the suit in the ori-  
of the said plaintiff, in the said suit in the said condition mentioned. And ginal ac-  
tion (b).  
this, &c.—[Conclude with a verification, and *onerari non*, as ante, 954.]

[*First plea*, *non est factum*, as ante, 952; *second plea*, *actio non*, as ante, 906.]—Because he says, that the said sheriff of — was not commanded  
by the said writ of latitat, in the said declaration mentioned, to take the  
said E. F. in manner and form as the said plaintiff, assignee as aforesaid,  
hath above thereof in the said declaration in that behalf alleged, and of this  
the said defendant puts himself upon the country, &c.—[*Third plea*, *actio*  
*non*.]—Because he says, that no such writ of latitat, as in the said decla-  
tion alleged.  
Plea that  
sheriff was  
not com-  
manded by  
latitat to  
take de-  
fendant, as  
in declara-  
tion alleg-  
ed.

(a) See the general note, post, 963. *Nil* Lord Raym. 1500.—2 Stra. 778.—Fort. 363,  
that is a bad plea to a debt on a bail bond, 2 367.—5 Burr. 2586. See the forms, *Morg.*  
*Wils.* 10.—5 Esp. 88. *Proc.* 513, 514, 507.—7 *Wentw.* 613.

(b) The defendant must plead specially, 2

ON RAIL  
BONDS.

Plea, that no such writ of latitat ever issued.

Plea, that there was no affidavit of the cause of action filed of record (c).

[\*980]

Plea by bail, that after the commencement of the action, the debt was levied on the principal under a writ of *feri facias* (d).

ration mentioned, ever issued out of the court of our lord the king, before the king himself, against the said E. F. in manner and form as the said plaintiff hath above in the said declaration in that behalf alleged, and of this the said defendant puts himself upon the country, &c.—[*Fourth plea actio non.*].—Because he says, that there is no such record of the supposed affidavit of the cause of action of the said plaintiff against the said E. F. affiled of record, in the said court of our lord the king, before the king himself, in manner and form as the said plaintiff hath above thereof complained, and this the said defendant is ready to verify, wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against the said defendant, &c.

And the said defendant, &c. comes and defends, &c. and says, that the said plaintiff ought not further, &c. [*onerari non.*]. Because he says, that at the time of executing the writ of our lord the king, of *testatum fieri facias*, hereinafter mentioned, there was due and owing from the said J. F. to the said plaintiff, for and on account of the said debt, damages, costs and charges in the said declaration mentioned, the sum of £— of lawful money of Great Britain, and no more, to wit, at Westminster, in the said county; and the said defendant further says, that after the said affirmation of the said judgment, and the said adjudication of the said court of Exchequer Chamber, (*this must agree with the facts*) and before the exhibiting of the said bill of the said plaintiff in this behalf, to wit, on, &c. in [Hilary Term last past, the said plaintiff, for the obtaining the said money then due to him, in respect of the debt, damages, costs and charges aforesaid caused to be issued out of the said court of our said lord the king, before the king himself, the said court then and still being at Westminster, in the county of Middlesex, upon the said judgment and adjudication, a certain writ of our lord the king, called a [*testatum fieri facias*] directed to the sheriff of D. against the said J. F. by which said writ our said lord the king commanded the said sheriff, that of the goods and chattels of the said J. F. and his bailiwick, he should cause to be levied the said sum of £— which the said plaintiff, therein called J. L. clerk, lately in the court of our said lord the king, before the king himself, at Westminster, recovered against the said J. F. for the debt aforesaid, which was adjudged to the said plaintiff in the said court, which he had sustained; also the said £— adjudged to the said plaintiff in the Court of Exchequer Chamber, before the justices of the Common Bench and barons of the Exchequer, of the degree of the coif, according to the form of the Statute in such case made and provided, for his damages, costs, and charges which he had sustained by reason of the delay of the execution of the judgment aforesaid, and in prosecuting the said writ for cause of error brought thereupon by the said J. F. against the said plaintiff in the said Exchequer Chamber, and that the said sheriff should have the money before our lord the king at Westminster, on [Monday next after eight days of the Purification

(c) See forms referred to, and note *b*, preceding page. In this case, there having been a misnomer in the former writ, and the declaration in the present action stating that a writ was issued against the now defendant by the name of L. F. the above pleas were found-

ed on this mistake, and defendant obtained a verdict, 2 Campb. 270, and see 2 Taunt. 399. 8 East, 328.—Ante, 446, n. As to whom this is pleadable, see ante, 447, note

(d) See Petersdorf on Bail, 367.



ation of the Blessed Virgin Mary,] to render to the said plaintiff for his debt and damages aforesaid, and that he should then have there that writ, upon which said writ afterwards, and before the delivery thereof to the said sheriff, was indorsed according to the course and practice of the said court, a direction from the said plaintiff to the said sheriff to levy the sum of £— besides interest, poundage, and officer's fees; and which said writ so indorsed as aforesaid, afterwards, and before the return thereof, to wit, on the — day of — at T. in the county of D. was delivered to — then being sheriff of the said county of D. to be executed in due form of law; by virtue of which said writ the said sheriff afterwards, and before the return thereof, and after the last continuance of the plea aforesaid, that is to say, after the — day of — in [Hilary] Term last, from which time the plea aforesaid was last continued here, to — in this same Term, and before this day, and after the exhibiting of the bill of the said plaintiff, that is to say, on, &c. within his bailiwick, to wit, at, &c. aforesaid, did cause to be levied of the goods and chattels of the said J. F. the said sum of £— being all the money then due and owing to the said plaintiff, upon and by virtue of the said judgment and adjudication, and all interest then due thereon, and also the poundage of him the said sheriff, and officer's fees, as he was directed by the said indorsement so made on the said writ, &c. as aforesaid; and this, &c. wherefore he prays judgment if the said plaintiff ought further to have or maintain his said action thereof against him, &c.

ON RAIL  
BONDS.

[\*981]

[*Onerari non, as ante*, 954.]—Because he says, that after the making of a certain act of parliament, made and passed in the 23d year of the reign of the lord Henry the Sixth, formerly King of England, to wit, on the — day of — A. D. — to wit, at, &c. (*venue*) aforesaid, the said E. F. in the said declaration of the said plaintiff named, was arrested at the suit of the said plaintiff under colour of the said writ, in the said declaration mentioned, by the said G. H. who then and there was sheriff of the said county of — and the said E. F. was kept and detained by the said sheriff, in the custody of him the said sheriff, under color of the said writ, and under the said arrest, for want of his finding bail for his appearance before his said Majesty, from the said — day of — A. D. — aforesaid, and until after the said — day of — mentioned in the said writ, and until he the said defendant as bail or surety for the said E. F. afterwards, and after the return of the said writ, to wit, on the — day of — A. D. — aforesaid, at, &c. (*venue*) aforesaid, by the said writing in the said declaration mentioned, bearing date the — day of — A. D. — aforesaid, but in fact sealed by the said defendant, and by him delivered as his act and deed, on the said — day of — A. D. — aforesaid, and not before the return of the said writ, became bound to the said then sheriff, in the said sum of £— under the condition

Plea by one of the bail that the bond was taken for ease and favor after return of writ contrary to the statute 23 Hen. 6. c. 9. (c).

(c) See forms of pleas of ease and favor, Brownl. Rep. 222.—7 Wentw. 618, 14.—1 Saund. 15, 167.—2 Saund. 76; and as to this plea in general, see Com. Dig. Pleader, 2 W. 25.—1 Saund. 163, n. 2.—2 Saund. 60, in nota. It has been usual in precedents of this plea, to set forth a great part of the Statute. see Lil Ent. 1:25.—Morg. Prec. 507, and

and other forms, 7 Wentw. 618, but this is unnecessary, the statute being a public act, 2 T. R. 575, and if it be mis-recited, the mistake will be fatal, Lord Raym. 382.—Dougl. 94, 97.—6 T. R. 776.—5 Wentw. 48, n. a. If the bond be void on the face of it, the plea of *non est factum* will suffice, 4 M. & S. 388.—2 T. R. 575.

ON BAIL  
BONDS.

above-mentioned, "for ease and favor to be shown by the said sheriff to the said E. F. from his said imprisonment, and from his deliverance therefrom, to be had and obtained; which said writing the said then sheriff then and there took of the said defendant, by color of his said office of sheriff of the said county of — contrary to the Statute aforesaid, and so the said defendant saith, that the said writing so brought here into court, is void in law by force of the said statute. And this, &c.—[*Conclude with a verification and onerari non, as ante, 954.*]

Comperuit  
ad diem (f).

[*Actio non, as ante, 906, first form.*].—Because he says, that the said E. F. did appear before the lord the king [or, in *C. P.* "before his majesty's justices"] at Westminster, on — in the said condition of the said writing obligatory mentioned, according to the form and effect of the said condition; as by the record of the said appearance remaining in the said court of our said lord the king, before the king himself [or, in *C. P.* "before his said Majesty's justices,"] at Westminster aforesaid, more fully appears. And this, &c.—[*Conclude with a verification, by the record, as ante, 907.*]

Other  
pleas.

*Defendant may plead non est factum; nil debet, is a bad plea, and if pleaded, plaintiff should demur to it, for if he join issue on it, he will be bound to prove every material averment in his declaration, and also let the defendant into any defense which he may have to the action.* 5 *Esp.* 38; see 1 *Schw. N. P.* 583. *Defendant may show under the plea of non est factum, a material variance between the bond and condition, as set forth in the declaration.* 2 *Marsh.* 96.—6 *Taunt.* 394, *S. C.*—*R. & M.* 93, or that the bond is void by erasure, alteration, cancelling, &c. 5 *Co.* 119.—*Co. Lit.* 356, n. or by matter of fact that voids it in law, as coverture.—12 *Mod.* 609.—2 *Campb.* 272.—*Lunacy*, 2 *Str.* 1104.—3 *Campb.* 126. *Drunkenness*, *B. N. P.* 172. or that it was delivered as an escrow, 4 *Esp.* 255; *ante*, 962; that it was taken and dated after the return-day of the writ, 4 *M. & S.* 338.—2 *T. R.* 569, or that the condition was not filled up when it was made, 3 *Camp.* 181; see *Com. Dig. Fait*, a 1. *But intrinsic matter, which shows that the deed was voidable, as that it was not made according to the 23 H. 6. c. 9, or that there was no process to arrest the defendant, Say. 116, must in general be pleaded. The circumstance of the action being brought in the wrong court, as we have seen, cannot be taken advantage of under this plea, ante, 445, n. The irregularity should be made as a ground of motion, to set aside the proceedings, as defendant should plead in abatement or demurrer, ante, 445, n. If the bond or condition be incompatible with the 33 Hen. 6. c. 9, and the de-*

(f) See forms, 5 *Wentw.* 470, 478.—*Lil. Ent.* 114, 124, 479, 498.—*Brownl. Red.* 200. Replication, &c.—1 *Taunt.* 28. Upon a replication of *nul tiel record*, the court will direct the day of the appearance of the Common

Pleas to be entered in the filacer's book, 1 *Taunt.* 28; and see 6 *Taunt.* 167. This plea need not be signed in *C. P.* *Tidd*, 725. See form of replication of *nul tiel record*, *Lil. Ent.* 114, 498.

fect appear in the declaration; it need not be pleaded, and the objection will be bad, even after verdict. 2 T. R. 596. ON BAIL BONDS.

The mere practice of the court cannot be pleaded if the practice does not go to the merits of the defense, such a plea neither avoids nor denies the facts in the declaration. The mode of taking advantage of irregularities in practice, is by application to the court, or by plea in abatement, 5 Moo. 168.—1 B. & A. 393. The defendant cannot plead that the cause was out of court, for want of a declaration before the assignment of the bond was taken, 2 East, 442.

Matters of defense in equity, 7 East, 153.—10 East, 377, or merely founded on the discretion of the court, cannot be pleaded. 2 East, 442. 4 ib. 311.—7 ib. 153.—2 Camp. 396. Thus it cannot be pleaded that the action is brought for the benefit of, or as trustee for the sheriff's officer, 7 East, 147; and see 1 Lev. 235.

It may be pleaded by bail that the principal was taken under an attachment for non-payment of costs, 2 B. & A. 56.—1 Price, 23.

The defendant may, in an action by the assignee of the sheriff, plead generally that the bond was not assigned according to the statute. Willes, 208. Saund. 61, n.

\*See the precedents of pleas in action on replevin bonds, 7 Wentw. [ \*983 ]  
21. Willes, 5, 6.—12 East, 585.—Morg. 516. As these pleas do not  
very frequently occur in practice, it is sufficient to refer to the above pre-  
cedents. Whatever may be a defence to the action, except a mere matter  
of practice, should be pleaded specially. As to what is a defense, see  
ante, 457, notes; and Wilkinson on Replevin. The court will, in some  
cases, in an action on a replevin bond, give relief without plea. 2 B.  
& A. 107.—4 Moore, 618; as where execution has been issued, and  
satisfied and paid to avowment before the action on the bond. But the  
court will not, in general, set aside the proceedings, on the ground that  
the action is commenced before the condition has been broken, because it  
will be a good defence to the action. 5 Taunt. 776. Defendant may  
plead that there was fraud in obtaining the judgment, 2 Marsh. 392.—7  
Taunt. 97.—6 Moore, 495. ON REPLEVIN BONDS.

[First plea, non est factum, after craving oyer of bond and condition, as  
ante, 953; second plea, actio non, as ante, 906, third form.]—Because he ON BASTARDY BONDS.  
Non dam-  
nificatus  
(5).

(5) See the declaration on the bastardy  
bond, setting out the condition, ante, 440,  
and the precedents of pleas, 2 Saund. 81.—7  
Wentw. 615, 616. 1 Hen. Bla. 258.—Plead.  
290. See the law, Burn, J. tit. "Bas-  
tardy," 26th edit. If the condition of the  
bond be merely to indemnify the church-  
wardens, &c. this plea is sufficient, but if, as  
is frequent, the condition be for the payment  
of a specific sum per week for the maintenance  
of the child, performance must be pleaded  
specially, see 1 B. & P. 638, 640, n. a. b. 1  
Saund. 116, n. 1. Care also must be taken to  
plead specially in excuse of performance, for if

ON BASTARDY BONDS.

says, that the said churchwardens and overseers of the poor of the parish of — aforesaid, at the time of making the said writing obligatory, and named in the said condition thereof, and their successors for the time being, and the inhabitants and parishoners of the said parish of — at the time of making the said writing obligatory, and mentioned in the said condition, and their successors for the time being have not, nor have, nor hath, any or either of them at any time since the making of the said writing obligatory, hitherto been in any manner whatsoever damnified for, or by reason or means, or on account of any matter, cause, or thing in the said condition of the said writing obligatory mentioned. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

[\*984]

That after giving the bastardy bond, the woman voluntarily removed into another parish, and the child was there born and settled and that therefore plaintiffs were of their own wrong damnified (h).

[\**First plea, non est factum, as ante, 952; second plea non damnificatus, as ante, 983; third plea, actio non, as ante, 906.*—Because he says, that after the making of the said writing obligatory and condition, and before the birth of the said child whereof the said [Mary P.] declared herself to be pregnant as aforesaid, the said [Mary] voluntarily removed herself from the said parish of [Partrishow,] to the parish of [Talgarth,] in the county aforesaid, and afterwards, to wit, on the — day of — in, &c. was delivered of the said child, in the said condition mentioned, whereof the said [Mary] had so declared herself pregnant as aforesaid, in the parish of [Talgarth,] aforesaid, the said child being then and there born a bastard; by reason whereof the said child was lawfully settled in the said parish of [Talgarth,] and was not, nor at any time since the birth thereof hath been chargeable to or lawfully settled in the said parish of [Partrishow]; and so the said defendant saith, that if the above-named churchwardens or overseers of the said parish of [Partrishow,] and their successors for the time being, and the inhabitants and parishoners of the said parish of [Partrishow] for the time being, or any or either of them, have been at all damnified by reason of the birth, education, or maintenance of the said child, or by reason of any charge touching the same, the said churchwardens, overseers, and inhabitants of the parish of [Partrishow,] have been so damnified by their own voluntary act, and of their wrong, and this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

ON INDEMNITY BOND.  
Non damnificatus (i).

[\*985]

[*Actio non, after craving oyer, of the bond and condition as ante, 953.*—Because he says, that the said plaintiff hath not, at any time since the making of the said writing obligatory and condition thereof, hitherto been in anywise damnified, by reason or means of any matter, cause or thing in the said condition of the said writing obligatory mentioned. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

the defendant plead *non damnificatus*, he cannot afterwards rejoin that the plaintiff would not suffer him to support the child, or that the plaintiff was damnified of his own wrong, as such rejoinder would be a departure, ante, 977, n. y — 2 Saund. 88.

(h) It is proper to plead this specially; for if the defendant only plead *non damnificatus*, he cannot afterwards rejoin that the plaintiffs were damnified in their own wrong, as such

rejoinder would be a departure, 2 Saund. 184. — Ante, 977, n. y.

(i) See note to the former precedent, and to the forms, 9 Wentw. 616 to 621 — 1 Saund. 115. When the condition of the bond is merely to indemnify, this plea is sufficient, but when the condition stipulates to perform any particular act, performance must be specially pleaded, 1 Saund. 116, n. 1, as in the following precedents, 1 B. & P. 688, 640.

[*Actio non, as ante, 906.*—Because he says, that if plaintiff has been damnified for or by reason or means, or on account of any matter, cause, or thing, in the said condition of the said writing obligatory, [or, *when the breach is stated in the declaration, say, "in the said declaration,"*] mentioned, the said plaintiff has been so damnified of his own wrong, and by and through his own means and default. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

ON INDEMNITY BONDS.

Plea that if plaintiff suffered any damage, it was by his own wrong and default. To declaration to debt on bond, to pay money and indemnify, that defendant did pay and indemnify.

[*Actio non, as ante, 906.*—Because he says, that he the said defendant did pay the arrears of the said annuity to the said Ann, and every part thereof, and well and sufficiently save, protect, defend, keep harmless, and indemnified the said Joseph Walker, his executors and administrators, and his and their goods, estates, and effects, from and against the payment of the said sum of money mentioned in the said schedule in the said declaration mentioned, and from and against all actions, suits, claims, and demands, for or upon account of the same, according to the tenor and effect, true intent and meaning of the said covenant in the said indenture contained, and of this he the said defendant puts himself upon the country, &c.

[*Actio non, after craving oyer (l) of the bond and condition, and setting out the latter, as ante, 953.*—Because he saith, that he the said defendant did (m) from time to time, \*and at all times after the making of the said writing obligatory, and the said condition thereof, well and truly observe, perform, fulfil, and keep all and singular the articles, clauses, payments, conditions, and agreements in the said condition of the said writing obligatory specified, comprised, and mentioned, in all things therein contained on his part and behalf to be observed, performed, fulfilled, and kept, according to the tenor and effect, true intent and meaning of the said condition of the said writing obligatory. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

ON BONDS FOR PERFORMANCE OF COVENANTS

First performance generally, of bond conditioned for performance of acts therein mentioned (k).

[*See the notes to the former precedent, and the forms in 3 Wills. 383. Corp. 575, 6.—2 Saund. 409. The plea may be in the following form:—Actio non, after craving oyer of the bond and condition, containing stipulations not to perform some acts and to perform others, as also stipulations in the disjunctive or alternative, and in the affirmative and setting out the condition, as ante, 953.*—Because he saith, that he the said defendant did not, &c. [*Alleging that defendant did not do any of the acts he stipulated to perform, and which may be in the words of*

[\*986] The like to a bond conditioned for the performance as well of negative as of disjunctive and

(k) Where all the covenants, &c. in the bond are in the affirmative and not in the negative, nor in the disjunctive nor alternative, performance may be pleaded generally in the words of the condition, and the plaintiff in his replication show a breach, 2 East, 410, n. 3.—4 East, 340.—Com. Dig. Pleas, E. 26.—1 Saund. 116, note 1.—Ante, i Index, tit. "Performance." See the covenants of performance generally, 7 Wentw. 637, but if there be anything specific or singular in the thing to be performed, though stating number of acts, performances of

each must be particularly stated, 1 Saund. 116, 17, note 1.—4 East, 344.—Ante, vol. i. Index, tit. "Performance."

(l) A defendant cannot plead performance of the condition, without praying oyer and setting out the condition in *hec verba*, 2 Saund. 409, note 2.

(m) In pleading performance generally, the allegations in the plea are usually in the words of the condition, unless the thing to be performed be specific, in which case the time and mode of performance should be specially stated, see ante, 685, note k.

affirmative covenants. Observation of the negative covenants.

ON BONDS  
FOR PER-  
FORMANCE  
OF COVE-  
NANTS.

Perform-  
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alternative  
or disjunc-  
tive cove-  
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*the condition, see the precedent, 2 Saund. 409, and then proceed to state the defendant's performance of the alternative covenant, according to the fact which may be as follows:]* And the said defendant in fact saith, that he the said defendant, after the making of the said writing obligatory, to wit, on the — day of — A. D. — at, &c. aforesaid, did, &c. [*Here state the performance by the defendant of the alternative covenant, i. e. that he did one or other of the acts which he had the option to perform, and then state generally the defendant's performance of the affirmative covenants as follows:]*—And the said defendant further saith, that he the said defendant did from time to time, and at all times, after the making of the said writing obligatory, well and truly observe, perform, fulfil, and keep, all and singular other the articles, clauses, payments, conditions and agreements, in the said condition of the said writing obligatory specified, comprised or mentioned in all things therein contained on his part and behalf to be observed, performed, fulfilled, and kept, according to the tenor and effect, true intent and meaning of the said condition of the said writing obligatory. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

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affirmative  
covenant.  
Perform-  
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rally to  
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formance  
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nants in  
an inden-  
ture (m).

[\*987]

[*Actio non, as ante, 953, after craving oyer of the bond and condition, and setting out the latter, which was for the performance of covenant in an indenture.*—Because he says, that the said indenture, [*or, "articles of agreement," &c. according to the fact*] in the said condition of the said writing obligatory mentioned, was and is a certain indenture, [*or, "articles of agreement," &c.*] made heretofore, to wit, on the — day of — A. D. — to wit, at, &c. (*venue*) aforesaid, between the said plaintiff on the one part, and the said defendant of the other part, and which said indenture, sealed with the seals of the said plaintiff, and defendant respectively, and bearing date the same day and year aforesaid, is now in the custody, possession, or power of the said plaintiff, and therefore he the said defendant cannot produce the same here in the court, and which said indenture is as follows:—[*here copy the indenture verbatim to the end of the words "in witness, &c."*](n), as by the said indenture reference being thereunto had, will fully appear; and the said defendant further saith that the said defendant hath always, since the making of the said writing obligatory, hitherto well and truly observed, performed, fulfilled, and kept all and singular the covenants, articles, clauses, provisos, conditions, and agreements in the said indenture comprised and mentioned, which on the part and behalf of him the said defendant and his assigns, were or ought to be

(m) See forms, 1 Saund. 52 to 56.—3 Wils. 881 to 885, and 7 Wentw. 537.—Co. Ent. 130, 134.—1 Saund. 10, n. 1.—Lil. Ent. 115, 116, 118, and the notes to the preceding forms. The whole of the indenture referred to in the condition, ought in strictness to be set forth, as in the precedents, 1 Saund. 52 to 55.—See 4 East, 244, note 4, and 365, 6.—1 Saund. 816, 17, note 2, 9, note 1.—2 Saund. 409, note 2, and the defendant cannot crave oyer of such indenture, though it be in the hands of the plaintiff, though the court will compel the plaintiff to give a copy of the indenture to the defendant, where he has not one part in

his possession. 1 Saund. 8, 9.

(n) Sometimes the precedents do not state the whole deed, but only the parts containing the covenants, thus, "whereby the said A. B. demised," &c. (*setting it out according to the legal effect and concluding, after reference to the lease, as follows:*) "and which said covenant and matters hereinbefore set forth are all the covenants, grants, articles, clauses, provisos, payment, agreements, and conditions, which on the part and behalf of the said E. F. were and ought to be observed, performed, and fulfilled, according to the said indenture.

observed, performed, fulfilled, or kept, according to the true intent and meaning of the said indenture. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

ON BONDS  
FOR PER-  
FORMANCE  
OF COVE-  
NANTS.

[*Actio non, after craving oyer of the bond and condition, and setting out the latter, as ante, 953.*]—Because he says, "that there was not, nor there any negative or disjunctive covenant or agreement contained or specified in the said indenture in the said condition of the said writing obligatory mentioned, on the part and behalf of the said defendant to be observed, done, observed, performed, fulfilled, or kept; and that he the said defendant hath well and truly performed, fulfilled, and kept the said indenture, and all things therein contained, on his part and behalf to be observed, performed, fulfilled, and kept, according to the true intent and meaning thereof. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

The like in  
a more  
concise  
form (o).

[\*988]

[*See the precedents, 1 Saund. 145, 146; 3 Wils. 388; and 5 Wentw. 588. The form of this plea is precisely similar to the four precedents, except in the mode of stating the performance, which must necessarily be according to the fact of each particular case, and may be in substance, as in the precedents above referred to.*]

Perform-  
ances spe-  
cially.

[*After craving oyer of the bond and condition, and setting out the latter, and pleading actio non, as ante, 953,*] and if the bond be conditioned for the performance by the defendant of covenants in an indenture, &c. stating such indenture, pleas of this nature, state the matter of excuse for the defendant's non-performance, and conclude with a verification; see precedent, 1 Saund. 100. of plea to debt on bond, conditioned to account for monies, &c. that no money, &c. came to the defendant's hand, and see 2 East, 485, where the death of one of several obligees was pleaded to debt on a bond to account for monies received by the defendant, the deceased and other obligees; the following plea of non-performance, by the plaintiff, of a condition precedent may serve as a general precedent as to the mode of arranging the different allegations.

Excuse of  
performance  
(p)

[*Actio non, as ante, 906.*]—Because he says, that the said defendant before the said — day of, &c. in the said agreement mentioned, to wit, &c. at, &c. (*venue*) was ready and willing and offered to the said plaintiff to produce a clear and perfect title in the law, of and in the said messuages and tenements, and to execute a proper conveyance thereof to the said plaintiff, to hold to him the said plaintiff, his heirs and assigns forever, upon his the said plaintiff's paying to the said defendant the full sum of £—, as and for the purchase-money thereof, whereof the said plaintiff then and there had notice; but that the said plaintiff then and

[\*989]  
Plea in ex-  
cuse of  
perform-  
ance that  
defendant  
was ready  
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ing to have  
produced a  
good title  
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tiff's pay-

As to this form of pleading, see 4 East, ante, 986 note k; and 1 Saund. 817, 2, and vol. 1. Index, tit. "Performance." It is questionable whether this form will succeed, it has frequently been adopted in practice where the indenture referred to in the condition is very long.—If there be a negative or disjunctive covenant, the plea may state, that

the indenture contained the same, and aver that there was no other such covenants, and show performance thereof, and conclude as above, stating the general performance of the affirmative covenants

(p) When a surety cannot plead an indulgence to the principal, see 10 East, 85.

(q) See Dougl. 684.

ing the  
purchase  
money, but  
that the  
plaintiff  
discharged  
him whol-  
ly there-  
from (q).

ON BONDS  
FOR PER-  
FORMANCE  
OF COVE-  
NANTS.

there required the said defendant not ever (*r*) to produce the same, or to execute the said conveyance to the said plaintiff, and the said plaintiff then and there forbid the said defendant then or ever so to do; and the said plaintiff then and there declared to the said defendant that he would not, nor did he ever pay to the said defendant the said sum of £—, &c. as for the said purchase-money, and the said plaintiff then and there wholly declined and disavowed, and discharged the said defendant from the carrying of the said agreement in the said declaration mentioned into execution, for which reason and no other the said defendant did not, upon or before the said — day of, &c. produce, nor hath he at any time since hitherto produced a clear and perfect, or other title in the law, of and in the said freehold messuages and tenements, and premises, or any part thereof, to him the said plaintiff, to hold the same to him the said plaintiff, his heirs and assigns for ever, according to the tenor and effect, true intent and meaning, of the said agreement in that behalf, and this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

Non-per-  
formance  
by plaintiff  
of a condi-  
tion prece-  
dent.

[*Actio non, after craving oyer of the bond and condition, and setting out the latter, as ante, 953, or if the bond be conditioned for the performance of covenants in an indenture, and the plaintiff has neglected to perform a condition precedent therein, then set forth the indenture, and the reference thereto, as in the precedent, ante, 958, and then state the plaintiff's non-performance, as follows:*—And the said defendant as to the said covenant in the said indenture contained, that he the said defendant would, during the continuance of the said demise, repair, and keep in repair, the said demised premises, with the appurtenances, being allowed timber in the rough, sufficient and proper for such repair, from time to time to be provided and set out by the said plaintiff, his heirs and assigns [*this is to be according to the words of the particular covenant qualified by the condition precedent*], the said defendant saith, that at the time of the making of the said demise, the said premises were ruinous, prostrate, and in great decay, for want of needful and necessary reparation and amendment thereof, and that after the making the said indenture, to wit, on the — day of — A. D. — at, &c. (*venue*) aforesaid, there was need and occasion for a large quantity, to wit, — loads of timber in the rough, to repair the said demised premises, with the appurtenances; and the said defendant then and there requested the said plaintiff to allow him the said defendant timber in the rough, sufficient and proper for the repair of the said demised premises, with the appurtenances, and to provide and set out the same accordingly, yet the said plaintiff did not, nor would, when he was so requested, as aforesaid, or at any time before or since, allow to him the said defendant timber in the rough, sufficient or proper for the repair of the said demised premises, with the appurtenances, or provide or set out the same, but then and there wholly neglected and refused, and hath thence hitherto wholly neglected and refused so to do, to wit, at, &c. (*venue*) aforesaid; and the said defendant further saith, that he the said defendant hath always, (1) since the making the writing obligatory, well and

(*r*) This form was drawn by an eminent Pleader, but it seems an awkward mode of stating the facts.

(1) When a defendant would excuse himself for the non-appearance of part of the condition of a bond, he must also plead performance of every other part; because if any part be broken, the penalty is forfeited, 10 Mass. 543.



truly observed, performed, fulfilled, and kept, all and singular other the covenants, articles, clauses, provisos, payments, conditions, and agreements, in the said indenture comprised and mentioned, \*which on the part and behalf of him the said defendant and his assigns, were or ought to be observed, performed, fulfilled, or kept according to the true intent and meaning of the said indenture. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

ON DEBTS  
FOR PER-  
FORMANCE  
OF COVE-  
NANTS.

[\*990]

[*First plea, non est factum, as ante, 952; secondly, actio non, as ante, 966, third form.*].—Because he saith, that although he the said plaintiff for a reasonable time after the making of the said charter-party, was ready and willing, at St. Michael's aforesaid, to load and put on board such ship or vessel a cargo, according to the meaning and effect of the said charter-party; yet the said plaintiff in fact saith, that the said ship was not, at the commencement of the said voyage, seaworthy, and during the said voyage was not kept staunch, tight, and strong, well manned, victualled, tackled, and provided in every respect fit for performing the said voyage, according to the said charter-party, but on the contrary thereof the tackle of the said ship or vessel, during the said voyage, was wholly insufficient and unfit for performing the said voyage, contrary to the meaning and effect of the said charter-party; and by reason thereof the said ship or vessel, during the said voyage, was greatly delayed in performing her said voyage, and did not arrive at St. Michael's aforesaid for a great and unreasonable length of time after the making of the said charter-party, to wit, until the — day of — in the year of our Lord — and thereby divers large quantities of fruit, which he the said plaintiff had before then provided, and had ready at St. Michael's aforesaid, in order that the same might be shipped and loaded at St. Michael's aforesaid, on board of the said ship as her cargo, in pursuance of the said charter-party, became and were perished and wholly destroyed, and thereby he the said plaintiff was hindered and prevented from shipping and loading on board the said ship or vessel such a cargo as aforesaid, to wit, at, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

ON CHAR-  
TER PAR-  
TIES.

To a declaration in debt on a charter-party, for a penalty for not shipping a cargo of fruit at St. Michael's,

[\*991]

that the plaintiff's ship was so unseaworthy and badly tackled, that in consequence the ship was delayed in her outward voyage, and did not arrive in reasonable time at St. Michael's to receive cargo on board (s). Third plea more concise

[*Third plea, actio non, as ante, 906, third form.*].—Because he says, that the said ship, in the said charter-party mentioned, was not, at the commencement of the said voyage, and was not during the same voyage kept staunch, tight, and strong, well manned and victualled, tackled and provided, in every respect fit for merchants' service, and particularly for preparing the said intended voyage in the said charter-party mentioned, whereby, and not by reason of any of the perils or other causes in the said charter-party mentioned, the said ship was prevented from arriving at St. Michael's aforesaid, within a reasonable time, for receiving a cargo from the said plaintiff, or his agents there, according to the true intent and meaning of the said charter-party. And this, &c.

[*Actio non, as ante, 906, third form.*].—Because they say, that the said ship did not stay and continue at the said ports of L. & S. respectively for the space of sixty-five running days, or any number of days, nor for the space of ten days, or any number of days after the expiration of the said supposed sixty-five days, in manner and form as the said plaintiff

Plea to declaration at suit of the owner of a ship against the freighter, for a pen-

(1) See other pleas to charter-parties, 8 East, 233, and post in covenant, 1007.

ON CHARTER-  
PARTY  
TIES.

ally incurred by breach of charter-party, that the ship did not stay at loading port sixty-five running days and ten more. Second Plea, that defendants were ready to load a cargo, and offered to do so, but plaintiff refused to receive it. [ \*992 ] Third plea, defendants did load a cargo abroad. Fourth plea, that ship departed before the expiration of the appointed time.

[ \*998 ]  
ON LEASES  
AND  
DEMISES.  
No rent in  
arrear (t).  
Eviction  
(w).

hath above in his declaration alleged, and of this they put themselves upon the country, &c. [*Actio non*].—Because they say, that after the arrival of the said ship off S. as in the said declaration mentioned, and within the space of sixty-five days, and ten days after the expiration of the said sixty-five days from the arrival of the said ship at the said last-mentioned port, to wit, on the, &c. at S. aforesaid, \*to wit, at London, &c. they the said defendants did offer and tender goods and merchandizes to load on board the said ship, to be carried by the same from the said port of S. on her return to the port of London, as it was lawful for them so to do according to the purport and true intent of the said charter-party of affreightment, but which said goods and merchandize the said plaintiff then and there refused to receive on board the said ship there for her homeward-bound voyage, and to sail homeward to the port of London, according to the form and effect of the said charter-party. And this, &c. wherefore, &c. [*Actio non*].—Because they say, that after the arrival of the said ship at the said port of S. as in the said declaration mentioned, and within the space of sixty-five running days, and ten days after the expiration of the said sixty-five running days from the arrival of the said ship at the said last-mentioned port, to wit, on, &c. at, &c. to wit, at London, &c. they the said defendant did, during the said time of the said ship being at L. and S. load and despatch the said ship, at and from the said port of L. and S. respectively, with divers goods and merchandizes to be carried from thence to London, according to the form and effect of the said charter-party, and of this they put themselves upon the country, &c. [*Actio non*].—Because they say, that after the arrival of the said ship at the said port of S. as in the said declaration is mentioned, and within the space of sixty-five running days, and ten days after the expiration of the sixty-five running days from the arrival of the said ship at the port of S. last-mentioned, to wit, on, &c. aforesaid, at, &c. (*venue*) aforesaid, the said ship, before the same could be loaded by the said defendants, without the consent, and in despite of the said defendant, did quit the said port of T. and depart to places unknown to the said defendant. And this, &c. wherefore, &c.

\*[*Actio non as ante*, 906, *First form*.]—Because he says, that no part of the said rent in the said declaration mentioned is in arrear or unpaid, in manner and form as the said plaintiff hath above in his declaration in that behalf alleged (u), and of this he the said defendant puts himself upon the country, &c.

[*First plea, nil debet (x) as ante*, 952; *second plea, actio non, as ante*, 996, *third form*.]—Because he says, that the said plaintiff, after the mak-

(t) This plea is sufficient in debt for rent, though not so in covenant, Cowp. 588. The above precedent is the form of the plea adopted in that case, see also, 1 Rich. C. P. 500.

(u) As to the words "*et isuit nil debet*," see Gilb. Debt, 440.—Bro. Dette, pl. 113, p. 123.

(w) See the form and note, 1 Saund. 204, note 2.—Gilb. Ev. by Loft, 385.—Bac. Abr. Rent, L.; and as to an eviction from part of the premises, and the tenant quitting the remainder, see id. 3 Campb. 513, 14, n.; and a plea of eviction by a stranger, Morg. 486.

See also a plea in bar in replevin of an eviction, post, 1192. A lessor granting more land than he is entitled to, operates as an eviction to that part to which he has no title, see 5 Moore, 566.

(x) This plea is sufficient, though the demise were by deed, 2 Saund. 397, note 1.—4 Ld. Raym. 1508. As to this plea in general, see 1 Saund. 204, n. 2. In debt for rent an eviction may be given in evidence under the general issue, but in covenant it must be pleaded, Saund. 204, n. 2.

ON LEASES  
AND  
DEMISES.

ing of the said indenture, and before any part of the said rent in the said declaration mentioned became due and payable to the said plaintiff, to wit, on, &c. with force and arms, &c. entered into and upon the said demised premises, and then and there ejected, expelled, put out, and amoved the said defendant from the possession thereof, and kept and continued him the said defendant so ejected, expelled, put out, and amoved from thence hitherto, to wit, at, &c. (*venue*) aforesaid. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

[*First plea, nil debet, as ante, 951; second plea, actio non, as in third form, ante, 906.*—Because he says, that after the making the said demise in the said declaration mentioned, and before any part of the said rent in the said declaration mentioned became due and payable, to wit, on, &c. at, &c. (*venue*) he the said defendant by a certain indenture of assignment, by him then and there made and duly signed by the said defendant, and sealed with his seal, for the considerations therein mentioned, did bargain, sell, assign, transfer, and set over unto G. H., &c. all the right title, interest, term of years then to come and unexpired, property, claim, and demand whatsoever of the said defendant, of, in, and to the said several demised premises, with the appurtenances, to have and to hold, &c. (*as the words of assignment*) by virtue of which said indenture of assignment the said G. H. afterwards, to wit, on the day and year last aforesaid, entered into the said demised premises, with the appurtenances, and became and was thereof possessed for the residuo of the said term then to come therein and expired, whereof the said plaintiff on the day and year last aforesaid, at, &c. (*venue*) aforesaid, had notice (z); and the said defendant further saith, that the said plaintiff, after the entry of the said G. H. into the said demised premises, with the appurtenances, under and by virtue of the said assignment, to wit, on, &c. at, &c. (*venue*) aforesaid, did accept and receive of and from the said G. H. as tenant to the said plaintiff, a large sum of money, to wit, the sum of £— for the rent aforesaid, in form aforesaid, reserved and then made payable, and then and there accepted the said G. H. as his tenant of the said demised premises, with the appurtenances. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

Plea by lessee, that he assigned the term to a third person, whom the plaintiff accepted as tenant (y):

[ \*994 ]

[*First plea, nil debet, as ante, 951; second plea, as actio non, as ante, 906, third form.*—Because he says, that after he the said defendant became assignee of the said demised premises, as in the said declaration mentioned, became due and owing to the said plaintiff, to wit, on, &c. at, &c. (*venue*) aforesaid, he the said defendant, by a certain indenture of assignment, then and there made, and duly signed by him the said defend-

Plea by an assignee that he assigned over his interest, before any rent became due (a).

(y) See the forms, 2 Saund. 297, 8.—7 Wm. 626. Where rent has been accepted of an assignee, the lessee cannot be sued in debt, but only in covenant if the demise were by deed; or in assumpsit, if the demise were by parol, ante, vol. i. Index, "*Lease*,"—1 Saund. 251, 242, n. 5. *Quære* if it should be shown in a plea that the assignment was signed according to the statute of Frauds, 1 Saund. 276, n. 2.—2 Saund. 297, notes 1 and

2.—Sir T. Raym. 451. This plea is not available in covenant for rent, 4 Taunt. 542. *Non est factum* it should seem, would be the proper assignment where the plea states an assignment by deed.

(z) 1 Sid. 388.

(a) See 2 Stra. 1221.—1 B. & P. 21. It is not necessary to aver notice of the assignment. Bac. Abr. Covenant, E. 4. 2 Vent. 284.—Sid. 839.

ON LEARN  
AND  
DEMURS.

ant, and sealed with his seal, for the considerations therein mentioned, did, &c.—[*State the assignment to the third person and his entry, as in the former precedents, and conclude with a verification, as ante, 907, sixth form.*]

*In the King's Bench.*

ON RECOGNIZANCE.  
Nul tiel record (d).

C. D. } And the said defendant by — his attorney, comes and defends  
ats. } the wrong and injury, when, &c. and says that there is not any  
A. B. } record of the said supposed recognizance [or, *if in debt upon a judgment, say, "of the said supposed recovery,"* in the said declaration mentioned, remaining in the said court of our said lord the king, before the king himself [or, *in C. P. "in the said court of our said lord the king of the Bench,"*] in manner and form as the said plaintiff hath above in his said declaration alleged, and this the said defendant is ready to verify (c).  
[ \*995 ] Wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against the said defendant, &c.

No *capias*  
*ad satisfaciendum*  
(c).

[*Actio non, as ante, 906.*]—Because he says, that after the recovery of the said judgment, as in the said declaration mentioned, and before the exhibiting of the bill of the said plaintiff against the said defendant in this behalf [or, *if in C. P. or by original, "before the commencement of this suit,"*] there was no writ of *capias ad satisfaciendum* duly (d) sued or prosecuted out of the said court of our said lord the king, before the king himself, [or, *if in C. P. "of the Bench aforesaid,"*] against the said E. F. upon the said judgment, and duly returned in the said court (e) as according to law, and the custom and practice of the said court, there ought to have been. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

Death of  
principal  
before re-  
turn of *ca.*  
*sa.* (f).  
[ \*996 ]

[*Actio non, as ante, 906.*]—Because he says, that after the recovery of the said judgment in the said declaration mentioned, and before the return of any writ of *capias ad satisfaciendum* thereupon against the said E. F. (the principal) at the suit of the said plaintiff upon the said judgment, to wit, on, &c. he the said E. F. died, to wit, at, &c. (venue) aforesaid. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

(b) See the forms indexed, 7 Wentw. 681.—Morg. 568—1 Rich. C. P. 208, 441.—2 Rich. C. P. 218. *Nul debet* is a bad plea, see Saund. 38 a.—2 Id. 344. 1 East, 380. The plea of *nul tiel record* merely puts in issue the existence of the record as stated. The plea, if pleaded alone, need not be signed.

(c) Not necessary, Fortescue, 339.—Com. Dig. Pleader, E. 38.

(c) This may be pleaded. But a mere irregularity in the practice cannot, see the next note. Also 2 Ld. Raym. 1096.—See the forms indexed, 7 Wentw. 681.

(d) See 16 East, 39.—1 D. & R. 50. The mere practice of the court is not pleadable, therefore where bail sued on a recognizance, pleaded that no *ca. sa.* was duly sued, returned and filed, according to the practice, which required that the writ should lie four clear days in the sheriff's office before its return, the plea was held bad on demurrer, 1 D. & R. 50; and see 7 B. & C. 800, S. P.

(e) The filing is not material. What fol-

lows after this allegation, except the conclusion, being an averment of matter of law, is not necessary, neither is it correct, see 1 D. & R. 50.—7 B. & C. 800.—Supra. It is however, usually inserted, if the plea be merely a sham one, 8 Burr. 1360, otherwise it should be omitted.

(f) See the forms, Morg. 545.—7 Wentw. 681.—2 East, 312.—4 T. R. 582. 1 Wils. 302. If the principal died after the return of the *ca. sa.* and before the return is filed, the bail are fixed, 6 T. R. 284. The bail cannot plead that the principal died before the issuing, 10 Mod. 268, 303, or after the return, 8 Mod. 31. 1 Str. 511, S. C.—2 Ld. Raym. 1452.—2 Sta. 717, S. C.—6 T. R. 284, of the *ca. sa.*; for though a plea that the principal died before the writ issued be conclusive, if found for the defendant, yet it is not so, if found for the plaintiff, inasmuch as the principal might still have died after the issuing and before the return of the writ.

[*Actio ulterius non, as ante*, 906.]—Because he says, that at the time of executing the writ of our lord the king of *testatum fi. fa.* hereinafter mentioned, there was due and owing from the said J. J. to the said plaintiff, for and on account of the said debt, damages, costs, and charges, in the said declaration mentioned, the sum of £— of lawful, &c. and no more, to wit, at, &c. (*venue*); and the said defendant further says, that after the affirmance of the said judgment and the said adjudication of the said court of Exchequer, and before the exhibiting of the said bill of the said plaintiff in this behalf, to wit, on, &c. at, &c. in Hilary Term last past, the said plaintiff, for the obtaining of the said money then due to him, in respect to the said debt, damages, costs, and charges aforesaid, out of the said court of our said lord the king, before the king himself the said court then and still being at Westminster, upon the said judgment and adjudication a certain writ of our said lord the king called a *testatum fi. fa.* directed to the sheriff of —, by which said writ our said lord the king commanded the said sheriff [*here set out writ, which may be as ante*, 748], upon which said writ afterwards, and before the delivery thereof to the said sheriff, was duly indorsed with a direction (*g*) from the said plaintiff to the said sheriff, to levy the sum of £— besides sheriff's poundage and officers' fees, and which said writ so indorsed as aforesaid; afterwards and before the return thereof, to wit, on, &c. was delivered to the said G. H. who then and from thenceforth, until and after the return of the said writ, was sheriff of the county of E, to be executed in due form of law. By virtue of which said writ, the said sheriff afterwards, and before the return thereof and after the last continuance of the plea aforesaid, that is to say, after the — day of — in Hilary Term last past, from which time the plea aforesaid was continued till this day, to wit, from the day in — in this same Term, and before this day, and after the exhibiting of the bill of the said plaintiff, that is to say, on, &c. within his bailiwick, to wit, at, &c. aforesaid, did cause to be levied of the goods and chattels of the said J. F. the said sum of £—, being all the money then due and owing to the said plaintiff upon and by virtue of the said payment and adjudication, and all the sheriff's poundage and officers' fees, as he was directed by the said indorsement so made on the said writ as aforesaid. And this the said defendant is ready to verify, wherefore he prays judgment if the said plaintiff ought further to have or maintain his aforesaid action thereof against him, &c.

ON RECOGNIZANCES.  
On a recognition of bail in error, that *puis darrein continuance* the debt was levied by *fi. fa.* on the principal.

It seems, a payment by 4 Ann. c. 16, s. 12, or a release to the principal or bail may be pleaded by the latter, but they cannot avail themselves of the bankruptcy and certificate of the principal, by pleading it in their discharge as their claim to relief on that ground, is founded rather upon the equitable jurisdiction of the court than upon any strict legal defense, *Petersdorff, on Bail*, 367.—1 B. & P. 428.—2 Id. 45.—5 Moore, 188.—1 B. & A. 393. 16 East, 39.

Other pleas.

It seems the bail may plead that a writ of error was sued out and allowed after the issuing, and before the return of the ca. sa. 2 East, 439.

(g) Examine this with writ.

ON JUDG-  
MENTS.  
Payment  
(h).

[*First plea, nul tiel record, as ante, 904; second plea, actio non, as ante, 906, third form.*]—Because he says, that after the recovery of the said judgment, and before the exhibiting of the bill of the said plaintiff against the said defendant in this behalf, [or, if in *C. P.* or by original, “before the commencement of this suit,”] to wit, on, &c. at, &c. (*venue*) aforesaid, he the said defendant paid and satisfied to the said plaintiff the said sum of £—, in form aforesaid recovered. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

Other  
pleas.

See the pleas in debt on judgments in general, *Com. Dig. Pleader, 2 W. 13.* The plea of *nul tiel record* is in form, as ante, 994. The defendant cannot plead accord and satisfaction, because the stat. of 4 Ann. c. 16, s. 12, only authorizes a plea of payment, 3 East, 251; see ante vol. i. *Index, tit. “Judgment.”* To debt on judgment against an executor, suggesting a *devastavit*, he may plead not guilty, 1 Saund. 219, n. 7.—See ante, vol. i. *Index, “Judgment.”*

ON STAT-  
UTES.

To an ac-  
tion for  
bribery,  
that a pri-  
or suit is  
depending  
for the  
same of-  
fenses (i).

[*Actio non, as ante, 606, first form.*]—Because he says, that one E. F. before the commencement of this suit, to wit, on, &c. in the — year of the reign of our lord the now king, sued and prosecuted out of the court of our said lord the king, before the king himself, against the said defendant a certain precept (*or writ, &c. according to the fact*) (k), of our said lord the king, called a bill of Middlesex, with intent to declare thereon as herein after mentioned, by which said precept the sheriff of the said county of Middlesex was commanded that he should take the said defendant, if he should be found in his bailiwick, and keep him safely, so that he might have his body before our said lord the king at Westminster, on — next after — to answer to the said E. F. in a plea of trespass; and the said defendant further saith, that afterwards, and before the commencement of this suit and before the said return of the said precept, to wit, on, &c. at Westminster, in the county of Middlesex, the said defendant was duly served with a copy of the said precept, with a notice thereto subscribed, according to the course and practice of the said court (l); and that afterwards that is to say, on, &c. in the — year of the reign aforesaid, in the court of our said lord the king, before the king himself, came the said E. F. by his attorney, and the said defendant, by his attorney aforesaid, also came according to the exigency of the said precept; and thereupon the said E. F. exhibited and filed his certain bill upon and by virtue of the said precept, against the said defendant of a plea of debt for £—, for and in respect of divers supposed penalties of £— each, in that bill alleged to have been incurred by the said defendant for certain offenses supposed to have been committed by the said defendant, contrary to the form of the Statute in such case made and provided; and the said E. F. then and there found pledges to prosecute his said bill, to wit, John Doe, and Richard Roe (m).

(h) This plea is given by the 4th Ann. c. 16, s. 12.

(i) See the forms, 7 Wentw. 682, 683.

The pendency of a prior suit in a penal action may be pleaded in bar. Sayer's Rep. 216.—*Bac. Ab. Actions, qui tam, D.* The defendant cannot plead double in a penal

action. (k) State the process, as ante, 445 to 453.

(l) This allegation is inserted in the particular case, on account of the 9 Geo. 2, c. 28.

(m) It has been usual to set forth the declaration in the former suit, as in this precedent.

ON STAT-  
UTES.

and after stating in the said bill, amongst \*other things, that before and at the time of the committing of the several supposed offences thereafter mentioned, an election of two burgesses to serve as burgesses for the borough of — in the county of — in the parliament of the United Kingdom of Great Britain and Ireland, was expected shortly to be had and made, and that before and until, and at such election the said defendant was a candidate, that he might be elected one of the said burgesses to serve in parliament for the said borough, the said E. F. in the — count of his said bill, complained against the said defendant; for that the said defendant before the said election, to wit, on, &c. at the borough aforesaid, in the county aforesaid, did unlawfully corrupt one G. H. who then claimed a right to vote in elections for members to serve in parliament for the said borough, by them and there unlawfully and corruptly given to the said G. H. a certain sum of money, to wit, the sum of £— as a gift and reward for him the said G. H. to give his vote in that election for the said defendant, contrary to the form of the Statute in such case made and provided; and in the — count of the said bill, the said E. F. also complained against the said defendant for that, &c.—[*Here state all the counts in the action at the suit of E. F. which were for the same penalties as those mentioned in the present suit, and then proceed as follows:*— And the said E. F. in each and every count of his said bill, after stating the supposed offence in such counts specified, alleged that an action had thereby and by force of the Statute in such case made and provided, accrued to him the said E. F. to demand and have, of and from the said defendant the said sum of £—. And which said action so commenced by and at the suit of the said E. F. against the said defendant as aforesaid, for the several penalties in his said bill mentioned, is now depending in the said court of our said lord the king, before the king himself, and wholly undetermined, to wit, at, &c. (*venue*) aforesaid. And the said defendant further says, that the said defendant named in the said precept and bill of the said E. F. and he the said defendant, the now defendant named in the said bill of the said plaintiff, are one and the same person, and not other \*or different persons, and that the said supposed offences [ \*998 ] mentioned in the said bill of the said E. F. though stated with small and immaterial variances with respect to the names of the persons supposed to have been bribed, and otherwise, are the same identical offences as are mentioned and alleged to have been committed in the said bill of the said plaintiff, and are not other or different offences. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

[*Actio non, as ante, 906, first form.*—Because he says, that after the committing of the said several offences in the said declaration mentioned, and before the exhibiting of the bill of the said plaintiff against the said defendant in this behalf, to wit, on the — day of — (*q*), in — Term, in the — year of the reign of our lord the now king, one E. F. said and prosecuted out of the court of our said lord the king before the king himself, the said court then and there still being holden at Westminster—

Another action for the same offence compounded by rule of court. (a).

but this does not seem to be necessary or advisable; and the averment that the two suits were for the same offences will suffice, see the next precedent, and ante, 904.

(a) See another form, 7 Wentw. 188.—Paley on Convictions, Appendix, 2d edit.

(e) The tests of the writ.

ON SEAT-  
VENUE

ster, in the county of Middlesex, a certain writ of our said lord the king called a latitat, for the purpose of recovering the same several sums of money (p) in the said declaration mentioned, and thereby alleged to be by the said defendant forfeited; and such proceedings were thereupon had, that afterwards, to wit, on — next after —, in the — year of the reign aforesaid, by a certain rule of the said court, it was ordered that the said E. F. should have leave to compound that action with the said defendant for the sum of £—, and the costs of the said suit to be taxed by the master; as by the said rule now remaining in the said court more fully appears. And the said defendant further saith, that the said offences for which the said action so compounded as aforesaid by the said rule of court was brought, and the said offences, in the said declaration in this suit mentioned, are the same identical offences, and not other or different offences, to wit, at, &c. (*venue*) aforesaid; and the said defendant further saith, that in pursuance of the said rule the said defendant afterwards, to wit, on, &c. aforesaid, at, &c. (*venue*) aforesaid, did pay to the said E. F. the said last-mentioned sum of £—, together with the said sum of £—, being the sum "taxed by the master for the costs of suit aforesaid, which said sums of £—, and £—, the said E. F. then and there accepted in full satisfaction and discharge of the said suit, to wit, at, &c. (*venue*) aforesaid. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

Former  
conviction  
for the  
same of-  
fense (q).

And the said defendant, as to the first count of the declaration, says, that the said plaintiff ought not to have or maintain his aforesaid action thereof against him. Because he says, that after the committing the said offense in that count mentioned, and before the exhibiting of the said bill of the said plaintiff in this behalf, to wit, on, &c. at, &c. (*venue*) aforesaid, one E. F. went before G. H. Esq. then and still being one of his majesty's justices of the peace for the said county of — residing near the place where the offense was committed, and informed the said G. H. that the said defendant on, &c. then last past, did, &c. [*here state the offense, as in the information*] and thereupon such proceedings were had before the said G. H. the justice aforesaid, that afterwards, to wit, on, &c. at, &c. (*venue*) aforesaid, the said defendant was duly convicted of the said offense, according to the form of the statute in such case made and provided; as by the same record in the court of our said lord the now king, of general quarter sessions of the peace, holden in and for the said county of —, more fully appears; which said judgment of conviction is yet in full force and effect, not reversed, quashed, or vacated. And the said defendant avers, that he the said defendant, who is sued by the name of defendant, in the said bill of the said plaintiff, and the said defendant in the said information and conviction named, are one and the same person, and not other or different. And that the said offense in the said — count of the said declaration mentioned, and the said offense in the said information charged, and whereof the said defendant was so convicted as aforesaid,

(p) Or "recovering penalties for the same offences." East, 487.—See forms, Paley on Convictions, Appendix, 2d edit.

(q) Must be pleaded, 2 Stra. 701.—See 9



was done and committed by the said defendant at one and the same time, and are in fact the very same identical offence, and not other or different offenses. And this he is ready to verify, wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him in respect of the said offense in "the said — count of the [ \*1000 ] said declaration mentioned, &c. And as to, &c.—[ *Nil debet, as ante. 951, to the other counts.* ]

ON STATUTES.

H. and another, )  
 ata. )  
 Simon. ) [ *Actio non, as ante, 906, first form.* ]—Because they say, that one J. S. after the committing of the said supposed offenses, and after the conviction thereof, as in the said declaration mentioned, and before the commencement of this suit, to wit, on, &c. in the — year of the reign, &c. sued and prosecuted out of the said court of our said lord the king, before the king himself, against the said defendants, a certain writ of our said lord the king, called a latitat, directed to the sheriff of — with intent to declare thereon as hereinafter mentioned, by which said writ of our said lord the king commanded, &c. [ *proceed as ante, 446 to 451, until statement of defendant's appearance,* ] and the said defendants further say, that the said writ was so sued out of the said court by the said J. S. against the said defendants, with intent to implead them the said defendants, amongst other things, for the said offenses in the said declaration in this suit mentioned, according to the course and custom of the said court, and that in pursuance of such intention the said J. S. afterwards, to wit, in — Term, in the — year of the reign, &c. exhibited and filed his bill, and declared against the said defendants being in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself, for the very same identical supposed offenses as those named and set forth in the declaration in this suit, and such proceedings were thereupon had in the said court of our said lord the king in the plea last aforesaid, that afterwards, to wit, in — Term aforesaid, it was considered and adjudged by the said court that the said J. S. should recover against the said defendants the sum of money in the said declaration above-mentioned, to wit, the sum of £2000, the same including, amongst other things, the penalties for the said supposed offenses in the said declaration in this suit mentioned, as by the record and proceedings thereof still remaining in the said court of our said lord the King, before the king himself, at Westminster aforesaid, more fully appears; which said judgment still remains in full force and effect, not in the least reversed, satisfied, or made void; and the said defendants further say, that the said J. H. and H. C. named in the said writ and bill of the said J. S. and the said J. H. and H. C. the said defendants named in the said bill of the said plaintiff, are the same persons and that the said offenses in the said bill and declaration of the said J. S. are the same identical offenses as are mentioned and alleged to have been committed in the said bill and declaration of the said plaintiff and not other or different—And this, &c. [ *Conclude with a verification, as ante, 907, sixth form.* ]

Judgment recovered by another person, for the same identical offenses, and penalties as in plaintiff's suit.

## \*IN COVENANT.

IN GENERAL—*In the King's Bench, [or, "C. P. or Exchequer."]*

— Term, — Will. 4.

*Non est factum* (a)

C. D. }  
ats. }

And the said defendant by E. F. his attorney, comes and defends the wrong and injury, when, &c. and says, that the said indenture (or "articles of agreement," or, "deed poll," as in the declaration) is not his deed. And of this the said defendant puts himself upon the country, &c.

*Non est factum* after craving oyer.  
Plea of payment (b).

The form of plea, as *ante*, 958, and notes thereto, will here apply.

[*Actio non*, as *ante*, 906, *first form*.]—Because he says, that the said defendant on the said, &c. aforesaid, at, &c. (*venue*) aforesaid, did pay to the said A. B. the said sum of £— in the said indenture mentioned. And of this the said defendant puts himself upon the country, &c.

Plea of performance (c).

[*Actio non*, as *ante*, 906, *first form*.]—Because he saith, that he the said defendant did, &c. [*Here state the performance in the words of the covenant, if such covenant were in the affirmative, and conclude as follows:*] according to the form and effect of the said indenture, and of the said covenant of the said defendant by him in that behalf made, as aforesaid, to wit, at, &c. (*venue*) aforesaid. And of this the said defendant puts himself upon the country, &c.

License (d).

[\*1002]

[*First plea, non est factum*, as *supra*; *second plea*, as follows:—And for a further plea in this behalf, as to the said \*supposed breach of covenant secondly above assigned, the said defendant, by leave of the court here, for this purpose first had and obtained, according to the form of the Statute in that case made and provided, saith, that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says, that he the said defendant did plough and break up, &c. [*Here enumerate the acts complained of, as in the declaration, or, if they be very numerous, the plea may be more concise, as follows:*]—"That he the said defendant did commit the said supposed breach of covenant first

(a) There is no general issue in covenant, 1 Stark. 811. *Non infregit conventionem* is a bad plea. 2 Taunt. 278.—8 T. R. 280.—See *ante*, vol. i. Index, "Covenant." This plea should be adopted where the defendant denies his execution of the deed, or where he is desirous of taking advantage of a variance in the setting it out. If he craves oyer, and plead it with *non est factum*, he cannot take advantage of such variance, 2 B. & A. 765.—4 B. & C. 741.—7 D. & B. 249, S. C.—*Ante*, 952, n.

(b) See form, Plead. A. 816, 449.—*Solvit post diem covenant* is bad, but it may be pleaded as accord and satisfaction, see *post*, 1002

(c) As to the mode of pleading performance whether of an affirmative or negative or disjunctive covenant, see *ante*, 981 to 986, and vol. i. Index, "Performance," and Com. Dig. Pleader, vol. ii. 13.—Co. Lit. 303 b. 9; and see forms, Morg. 489.

(d) A license it frequently pleaded in covenant, but when by parol it is not sustainable, unless provided for by the terms of the deed. In general a parol discharge is inoperative against a deed, and this plea is rarely sustainable. See the cases cited, 5 T. R. 280, 1.—2 Saund. 47, 48, n. t.—1 Taunt. 428.—8 T. R. 590.—Co. Lit. 222 b, note 2.

above assigned," by the leave and license of the said plaintiff to the said defendant for that purpose first given and granted, to wit, on the — day of — A. D. — at, &c. (*venue*) aforesaid. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

IN  
GENERAL.

[*Actio non, as to the first breach of covenant, as ante, 906.*]—Because he saith, that he the said defendant, before the commencement of this suit, to wit, on, &c. at, &c. (*venue*) aforesaid, paid to the said plaintiff the sum of £— in full satisfaction and discharge of the said sum of £— in the said breach of covenant mentioned, and of all the damages by the said plaintiff sustained, by reason of the non-payment thereof, which said sum of £— the said plaintiff then and there accepted and received of and from the said defendant in full satisfaction and discharge of the said sum of £— in the said breach of covenant mentioned, and of the damages of the said plaintiff by him sustained, by reason of the said breach of covenant. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

Accord  
and satis-  
faction (e).

*As rien in arriere is a bad plea in covenant for rent, &c. Cowp. 588 ; therefore, when the defendant has neglected to pay the money at the appointed day, but has paid it afterwards, this plea is proper. It is also advisable when in covenant the defendant brings money into court. See other form of plea of accord and satisfaction, 3 East, 252.*

Observa-  
tions  
thereon.

[*First plea, non est factum, as ante, 1001 ; second plea, actio non, as ante, 906, third form.*]—Because he says, that before and at the time of the making of and entering into the indenture in the said declaration mentioned, and before the passing of a certain act of parliament made and passed in the 6th year of the reign of his late Majesty King George the third, entitled, "An act to repeal so much of an act passed in the 6th year of his late Majesty George the First, as relates to the restraining several extravagant and unwarrantable practices in the said act mentioned, and for conferring additional powers upon his majesty with respect to the granting of charters of incorporation to trading and other companies," to wit, on the 1st day of July, in the year of our Lord 1713, to wit, at Westminster aforesaid, in the county aforesaid, divers persons, and amongst others, the said plaintiffs formed themselves and entered into a public undertaking, project, and attempt, tending to the great grievance, prejudice, and inconvenience of the subjects of our said lord the king in general, and great numbers of them in their trade and commerce, that is to say, by opening books for public subscriptions, drawing in persons to subscribe therein towards raising great sums of money, amounting in the whole to a large sum of money, to wit, the sum of £500,000, and by presuming to act as a corporate body, and pretending to make their shares in stocks transferable and assignable, without any act of parliament, or by any charter from the crown for so doing, and by pretending that they and the persons who should subscribe to and

Bubble  
Act and  
indenture  
void at  
common  
law, being  
made for  
furthering  
a scheme  
injurious  
to the pub-  
lic.

See precedent, Plead. A. 384. Accord and satisfaction made before breach of covenant, 1 Taunt. 428.—Com. Dig. Plead. 2 V. 8. *Sed vide* Cro. Elis. 46. Cannot be pleaded in bar of an action on

IN  
GENERAL.

take shares in the said undertaking, project and attempt, would form a company or partnership society for the purpose and object of purchasing and working mines of tin, copper, and lead ore, situate in or near the counties of Cornwall and Devon, and to smelt, manufacture, refine, or otherwise prepare for sale and to sell and dispose of the ores, metals, minerals, and other products to be obtained and raised from such mines respectively, when in truth and in fact there were no mines purchased or worked, intended so to be: and the said defendant in fact saith, that the said indenture in the said declaration mentioned, was made, entered into, and executed for the furthering, countenancing, and proceeding in the said undertaking, project, and attempt, tending to the common grievance of and to the common nuisance of divers and very many of the liege subjects of our said lord the king, and thereby the said indenture was and is wholly void in law, and contrary to the Statute in that case made and provided. And this the said defendant is ready to verify, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]—[*Actio non, as ante, 906, third form.*]—Because he says, that the said company or partnership in the said indenture mentioned was and is a public undertaking and attempt tending to the common grievance, prejudice, and inconvenience of great numbers of the subjects of our said lord the king, to wit, the said persons and names in the said indenture, and all the parties thereto, in their trade, commerce, and other lawful affairs, and that the said indenture was and is made and entered into for the furthering, countenancing and proceeding in the said undertaking and attempt, to the common grievance and nuisance of the said subjects of our said lord the king, whereby the said indenture was and is wholly void in law. And this he the said defendant is ready to verify, &c.—[*Conclude as ante, 907, sixth form.*]

Second  
plea.

Third plea.

[*Actio non, as ante, 906.*]—Because he says, that the said company or partnership in the said indenture mentioned, was and is a company or partnership consisting, to wit, of the said plaintiffs, and other persons, presuming to act as if they were and are a corporate body, and pretending to raise a transferable stock, without any legal authority, and without any charter from the crown for so doing, that is to say, as a corporate body, for the purpose and object of purchasing and working mines of tin, copper, and lead ore, situate in or near the counties of Cornwall and Devon, and of smelting, manufacturing, refining, or otherwise preparing for sale, and of selling and disposing of the ores, metals, minerals, and other products to be obtained and raised from such mines respectively, and for other purposes unknown, and having a number of shares, not exceeding £10,000, transferable and assignable by and from the holders of such shares to any other person or persons at the pleasure of the holders thereof. And the said defendant in fact saith, that the said indenture was and is made and entered into for the furthering, countenancing, and proceeding in the said company or partnership, to the common nuisance and grievance of all the liege subjects of our said lord the king, whereby the said indenture was and is wholly void in law. And this, [*Conclude with a verification, as ante, 907.*]—[*Actio non, as ante, 906.*]—Because he says, that the said indenture was and is made and entered into for the furthering, countenancing, and proceeding in the said company or partnership therein mentioned, the said company or partnership being a new and unlawful under-

Fourth  
plea.

...taking, tending to the common grievance, prejudice, and inconvenience of great numbers of the king's subjects in their trade and commerce, that is to say, an undertaking for the purpose and object of purchasing and working mines of tin, copper, and lead ore, situate in or near the counties of Cornwall or Devon, and of smelting, manufacturing, refining, or otherwise preparing for sale, and of selling and disposing of the ores, metals, minerals, and other products to be obtained and raised from such mines respectively, and which said undertaking was a public undertaking and did then and there, and still doth relate to affairs in which the trade, commerce, and welfare of great numbers of the king's subjects were and are concerned, to wit, at Westminster aforesaid, in the county aforesaid, to the common nuisance of the liege subjects of our said lord the king, whereby the said indenture was and is void in law, &c.—[*Conclude with a verification, as ante, 907.*]—[*Actio non, as ante, 906.*]—Because he says, that the said company or partnership in the said indenture mentioned, was and is a company or partnership, without any legal authority, or without any charter from the crown for so doing, pretending to raise a transferable stock, to a large amount, to wit, not exceeding £50,000, to be divided into not more than, to wit, 10,000 shares, which shares were to be and are transferable and assignable from the holders thereof to any person or persons at the pleasure of such holders: And the said plaintiff further saith, that the said indenture was and is made and entered into for the furthering, countenancing, and proceeding in the said company or partnership, to the common grievance and nuisance of the said subjects of our said lord the king, whereby the said indenture was and is wholly void in law. And this the said defendant is ready to verify, wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c. Fifth plea.

[*First plea, non est factum, as ante, 1001; second plea, actio non, as ante, 906, third form.*]—Because he says, that the said T. after the making of the said indenture, and before the expiration of the second year of the said term of three years in the said indenture mentioned, to wit, on the 1st day of January, at, &c. (*venue*) aforesaid, wrongfully, and without the license or consent of the said defendant deserted from and left the service of the said defendant, and did not at any time afterwards return thereto; and the said defendant further says, that the said defendant did continually from and after the making of the said indenture until the said T. so deserted and left the service of the said defendant as aforesaid, find unto the said T. sufficient meat, drink, and lodging, to wit, at &c. (*venue*) aforesaid, and did, during that time, to wit, on, &c. at, &c. (*venue*) aforesaid, in lieu of all other necessities, pay unto the said T. £14 for the first year of the said Term, and during the residue of the said Term was ready and willing to have found, and would have found him the said T. sufficient meat, drink, and lodging, and paid him the other sums of money by the said defendant stipulated to be paid to him, according to the form and effect of the said indenture, and the said covenant of the said defendant on that behalf, if he the said T. had not so deserted from and left, or had returned to the service of the said defendant. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*] ON APPRENTICE DEEDS. Plea (to a declaration on a sea apprentice indenture for not finding necessities, and paying wages) that plaintiff deserted defendant's service (f).

(f) As to this defence, see 6 B. & C. 680.—1 B. & C. 460.—Ante, 517.

ON APPEAL—  
TRUE  
DEEDS.

Third plea,  
that plain-  
tiff with  
consent of  
defendant,  
entered on  
board an-  
other ship  
for a time,  
but desert-  
ed from  
the same.

[\*1004]

[*Third plea, actio non.*].—Because he says, that the said T. after the making of the said indenture, and before the expiration of the second year of the said term of three years in the said indenture mentioned, to wit, on, &c. at, &c. (*venue*) aforesaid, the said T. then being in the service of the said defendant on board of a certain ship or vessel of the said defendant, in parts beyond the seas, to wit, at Malta, and the said ship being then about to proceed to a certain other part beyond the sea, to wit, to Egypt, the said defendant, at the request of the said T. permitted and gave leave to the said T. to enter into the service of one C. who was then resident at Malta, and to continue therein until the said ship or vessel of the said defendant should return to Malta aforesaid, and the said T. by such leave and permission, did then and there enter into the service of the said C. and that the said ship or vessel did afterwards sail to Egypt aforesaid, and afterwards, to wit, on, &c. return to Malta aforesaid; and the said defendant further says, that the said T. after he the said T. had so entered into the service of the said C. and before the expiration of the said second year of the said term of three years in the said indenture mentioned, to wit, on, &c. wrongfully and without the license or consent of the said C. or of the said defendant, deserted and run away from and left the service of the said C. and did not at any time afterwards return thereto, or to the service of the said defendant; and the said defendant further says, that he the said defendant continually from and after the making of the said indenture, until the said T. so entered into the service of the said C. as aforesaid, and the said C. did, from that time until the said T. so deserted and run away as aforesaid, find the said T. sufficient meat, drink, and lodging, to wit, at, &c. aforesaid; and that the said defendant did, during that time, to wit, on, &c. at, &c. (*venue*) aforesaid, in lieu of all other necessities, pay unto the said T. £14 for the said term; and that the said C. would have found unto the said T. sufficient meat, drink, and lodging, until the return of the said ship to Malta, and the said defendant, during the residue of the said term, was respectively ready and willing to have found, and would have found him the said T. sufficient meat, drink, and lodging, and the said defendant would have paid him the other sums of money by the said indenture stipulated to be paid to him, according to the form and effect of the said indenture, and the said covenant of the said defendant in that behalf, if he the said T. had not so deserted and run away, or had afterwards re-entered into the service of the said defendant; and this he the said defendant is ready to verify, &c.

That de-  
fendant did  
provide,  
&c. board  
and lodg-  
ing accord-  
ing to his  
covenant.

[\*1005]

And for further plea, as to so much of the said breach of covenant in the said declaration lastly above assigned, as was incurred before the said dismissal and discharge of the said, &c. by the said, &c. from his service, by the said declaration above supposed, the said defendant says, &c. (*actio non*) because protesting that the said declaration in that respect and matters therein contained, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendant and the said defendant is not bound by law to answer thereto; nevertheless for a plea in this behalf the said defendant says, that he the said defendant continually after the making of the said articles, until the said supposed dismissal and discharge of the said plaintiff by the said defendant

from his service, at, &c. (*venue*) aforesaid, did find and provide for the said plaintiff good and sufficient meat, drink, and lodging, suitable to his situation, according to the form and effect of the said articles of agreement, and of the said covenant of him the said defendant in that behalf made as aforesaid, and of this he puts himself upon the country, &c.

ON AP-  
PRENTICE  
DEEDS.

And for further plea, as to so much of the said supposed breach of covenant in the said declaration above assigned, as was incurred before the said supposed dismissal and discharge of the said, &c. by the said, &c. from his said service, as in the said declaration mentioned, the said, &c. [*Actio non*.]—Because protesting that the said declaration in that respect, and the matters therein contained, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against him, and that he the said defendant is not under any necessity by the law of the land to answer thereto; for a plea, nevertheless, in this behalf the said defendant says, that he the said defendant continually after the making of the said articles of agreement, until the said supposed dismissal and discharge of the said plaintiff by the said defendant from his service as aforesaid, at, &c. aforesaid, was ready and willing to find and provide, and would, during all that time, have found and provided for the said plaintiff good and sufficient meat, drink, and lodging, suitable to his situation, according to the form and effect of the said articles of agreement, and of the said covenant of him the said defendant in that behalf made as aforesaid, but the plaintiff during all that time voluntarily, and of his own accord, without the request or license of the said defendant, found and provided for the said, &c. good and sufficient meat and drink, and lodging, suitable to his situation, to wit, at Westminster aforesaid, and this he is ready to verify; wherefore, &c.

Plea that  
defendant  
was ready  
to provide,  
&c. but  
plaintiff  
absented  
himself.

[\*1006]

And for a further plea in this behalf, as to the said breach of covenant by the said plaintiff in the said declaration first above assigned, the said defendant by leave of the court here, &c. [*Actio non, as ante, 906.*] Because protesting that the said defendant hath continually since the making of the said articles of agreement hitherto been ready and willing to employ the said J. O. in his said business of an attorney, solicitor, and agent, and to instruct, and cause him to be instructed therein, according to the form and effect of the said articles of agreement; for a plea, nevertheless, in this behalf, the said defendant says, that the said J. O. after the making of the said articles of agreement, and before the time of the said supposed dismissal and discharge of the said J. O. in the said declaration mentioned, to wit, on the — day of — in the — year aforesaid, at, &c. (*venue*) aforesaid, did voluntarily leave, quit, and depart from the said service of the said defendant without the license, leave, permission, or consent, and against the will of the said defendant, and hath remained and continued so absent from thence hitherto, to wit, at, &c. (*venue*) aforesaid; without this, that the said defendant dismissed and discharged the said J. O. from his said service, and refused to employ him in his said business of an attorney or solicitor, and agent, or to instruct or cause him to be instructed therein, in manner and form as the said plaintiffs

That the  
apprentice  
voluntarily  
absented  
himself,  
and trav-  
ersing the  
discharge  
by defend-  
ant (g).

ON CHARTER PARTY. have in the said breach of covenant first above assigned, alleged; and this, &c.—[*Conclude with a verification, as ante, 907.*]

[\*1007]

To declaration on charter-party for money due on demurrage, that defendant did not keep the vessel on demurrage over and above the lay days allowed by the charter party (h).

\*[*Actio non, as ante, 906.*—Because he saith, that he did not keep the said vessel on demurrage the said days, or any part thereof, over and above the said lay days in the said charter-party mentioned, in manner and form as the said plaintiff hath above alleged; and this, &c.

To declaration on charter-party for balance of freight, and also for demurrage, that defendant did send a cargo alongside of the

[*Actio non.*—Because he saith, that he the said defendant did send and cause to be sent, alongside of the said vessel in the river Thames, such goods as he thought proper to ship, and receive the same from alongside of her at — and send alongside of her at — such goods as he thought fit, and receive the same from alongside of her at London, within the time limited for those purposes, and days of demurrage in the said charter-party mentioned, and did not keep the said vessel any time over and above the time limited for the purpose last aforesaid, and the days of demurrage as aforesaid; and of this he puts himself upon the country, &c.

vessel, to be loaded on board within the days of demurrage allowed by the charter-party.

[\*1008]

To declaration on charter-party for balance of freight and for a sum due on account of demurrage, that he was ready and willing to have sent goods alongside of the vessel, but that she was not tight, staunch, and strong, &c.

[*Actio non, as ante, 906.*—Because he saith, that he the said defendant was always ready and willing to send and cause to be sent, alongside of the said vessel in the river Thames aforesaid, and at — aforesaid, a full and sufficient cargo of such goods as he thought proper to ship on board of the said vessel within the time limited for those purposes, and days of demurrage; yet the said defendant in fact saith, that the said vessel was not tight, staunch, and strong, nor was in every respect properly fitted and manned for the voyages from — aforesaid, and — aforesaid, so as to enable the said defendant safely or securely to send or cause to be sent, alongside the said ship or vessel such goods as aforesaid, in order that the same might be loaded on board thereof within the time and days of demurrage aforesaid; and this, &c.—[*Conclude with a verification, as ante, 907.*]

vessel, but that she was not tight, staunch, and strong, &c.

Plea, that defendant did send alongside of the vessel goods within the time limited, and days of demurrage in the charter party mentioned. Third plea, that defendant was always ready and willing to send along

[*First plea, non est factum, as ante, 1001; and for a further plea, actio non as ante, 906.*—Because he saith, that the said defendant did send and cause to be sent, alongside of the said vessel in the river Thames, such goods as he thought proper to ship, and receive the same from alongside of her at Heligoland, and send alongside of her at Heligoland such goods as he thought fit, and receive the same from alongside of her at London, within the time limited for those purposes, and days of demurrage in the said charter-party mentioned, and did not keep the said vessel any time over and above the time limited for the purpose last aforesaid, and the days of demurrage aforesaid, and of this he puts himself upon the country, &c. And for a further plea in this behalf, as to so much of the said supposed breach of covenant first above assigned, as relates to the not sending, or causing to be sent, alongside of the said vessel in the river Thames, and at Heligoland, such goods as he thought proper to ship on board thereof

(h) See forms in debt, ante, 987 to 989.



within the time limited for those purposes, and days of demurrage, the said defendant by like leave, &c. says, [*actio non*], because he saith, that the said defendant was always ready and willing to send and cause to be sent, alongside of the said vessel in the river Thames aforesaid, and at Heligoland aforesaid, a full and sufficient cargo of such goods as he thought proper to ship on board the said vessel within the time limited for those purposes, and days of demurrage; yet the defendant in fact saith, that the said vessel was not staunch, tight, and strong, nor was in every respect properly fitted and manned for the voyage from London aforesaid, or from Heligoland aforesaid, so as to enable defendant safely or securely to send or cause to be sent alongside the said ship or vessel, such goods as aforesaid, in order that the same might be loaded on board thereof within the time and days of demurrage aforesaid; and this, &c. wherefore, &c. And for a further plea in this behalf, to the said supposed breach of covenant secondly above assigned, defendant by like leave, &c. [*actio non*], because he saith, that he, defendant, before the commencement of this suit, to wit, on, &c. at, &c. aforesaid, paid to plaintiff the said sum of £— in full satisfaction and discharge of the said sum of £— in the said second breach of covenant mentioned, and of all damages by the said plaintiff sustained by reason of the non-payment thereof, which said sum of money the said plaintiff then and there accepted and received of and from the said defendant, in full satisfaction and discharge of the said sum of £— in the said second breach of covenant mentioned; and this, &c. wherefore, &c. And for a further plea in this behalf, to the said supposed breach of covenant lastly above assigned, the said defendant by like leave, &c. [*actio non*], because he saith, that he did not keep the said vessel on demurrage the said days, or any part thereof, over and above the said lay days in the said charter-party mentioned, in manner and form as the said plaintiff hath above alleged, and of this he the said defendant puts himself upon the country, &c.

Defendant paid debt in full satisfaction. Fifth plea, denial that defendant did keep the ship on demurrage over and above the time in charter-party mentioned.

[*First plea, non est factum, as ante, 1001; second plea, actio non, as ante, 906, third form.*]—Because they say, that the said stock of coals of the said plaintiff above-mentioned to have been insured as aforesaid, before and at the time of making of the said deed poll or policy, was described otherwise than it really was, to wit, at, &c. (*venue*) aforesaid; and of this they the said C. and D. put themselves upon the country, &c.   
 stance on coals, against loss by fire, showing that the policy was void (i).

[*Actio non, as ante, 906.*]—Because they say that divers large quantities, to wit, 100 bushels of the said coals in the said declaration mentioned, to have been the stock and property of the said, &c. and to have been on the said open wharf adjoining west, mentioned in the said deed poll or policy of assurance, and by the said declaration above-mentioned, to have been burnt, consumed, lost, and destroyed by fire before and at the time of the making of the said deed poll or policy of assurance, had

(i) See also the next plea. The policy was in the usual form of fire policies, and the pleas as well as the next set of pleas, will be applicable to ordinary cases. The defendant on

the trial obtained a verdict.

(k) This plea concludes to the country, because the allegation is a negative of what was averred in the declaration.

ON CHARTER PARTIES.

side the vessel at Heligoland and London, such full and sufficient cargo of goods, &c. within the time limited, but that the ship was not tight, staunch, &c. so as to enable him safely or securely to send them, in order to be loaded on board within that time, [*\*1009*] Fourth plea, that before the commencement of suit, de-

ON POLICIES OF INSURANCE.

Several pleas to covenant on a policy of insurance

[*\*1010*]

Second plea, that the coals were described in policy otherwise than as they really were (k). Third that goods were on fire at the

## ON POLICIES OF INSURANCE.

time of making the policy, and that it was obtained by fraud.

Fourth, that goods were of an inflammable nature, and therefore the special hazard ought to have been inserted in the policy, according to the printed proposals.

[\*1011]

taken fire, and were burning and consuming by fire, whereof the said plaintiff, before and at the time of the making of the said deed poll or policy of assurance, to wit, on, &c. aforesaid, at, &c. (*venue*) aforesaid, had notice (*l*), and then and there, with intent to defraud them the said defendants, fraudulently and deceitfully obtained and effected the said deed poll or policy of insurance, in the said declaration mentioned; and that they the said defendants are ready to verify, wherefore, &c.

[*Actio non, as ante*, 906.]—Because they say, that in and by the printed proposals, mentioned in and referred to by the said deed-poll or policy, it was expressed and declared, amongst other things, that common insurances where buildings covered with slate, or lead, and built on all sides with brick or stone, and goods and merchandize therein not hazardous, and where no hazardous trades are carried on, or hazardous goods deposited; that hazardous insurances were timber or plaster buildings, and goods and merchandize therein not hazardous; also thatched barns, and out-houses having no chimnies, or adjoining to any building having a chimney containing farmer's stock or implements of husbandry, or brick or stone buildings, wherein hazardous goods or trades were deposited or carried on, such as bread, and biscuit bakers, brewers, carpenters, chemists, color-men, coopers, inn-holders, victualers, malt-houses, sail-makers, ship and tallow chandlers, stable keepers, hemp, flax, pitch, "tallow, tar, rosin, turpentine, hay, straw, and all manner of fodder, and corn unthrashed, apothecaries' stock, also cotton, sugar, oil, and spirituous liquors. as merchandizes; likewise all shops and warehouses which have German or metal stoves with pipes. That doubly hazardous insurances were all other thatched buildings, and goods and merchandize therein, timber or plaster buildings wherein hazardous goods or trades are deposited or carried on, also salt-petre, sea biscuit-makers, oil leather-dressers, tallow-melters, wax-chandlers, boat-builders, china, glass, or earthen-wares. And that insurances were desired for any larger sum than were specified in the table of annual premiums, a special agreement might be made for the same; special agreements might also be made for mills and stock therein; also for mills or buildings containing any kiln, steam-engine, stove, or oven used in the process of any manufactory, or stock therein; or for other insurances more hazardous than those described in the second and third heads of insurances of the said printed proposals, as sugar-bakers, distillers, vish-makers, chemists' laboratories, manufactories of any commodities deemed hazardous, as flax-dressers, sail-cloth makers, rope-makers, floor-cloth painters, coach-makers, musical instrument makers, umbrella-makers, and refiners of salt-petre, spermaceti, and ore, cotton, flax, and lint-spinners, with all the operation attending the manufacturing of the materials from the raw state into thread for the weaver, or such like, for reason of the nature of the trade, the narrowness of the place, or other dangerous circumstances, which special hazard must be inserted in the policy to render the same valid and in force, to wit, at, &c. (*venue*) aforesaid. And the said defendants further say, that the said coals of the said plaintiff so as aforesaid burnt consumed, lost, and destroyed by fire at the time

(*l*) As policies on goods against fire are not like ship insurances "lost or not lost," so as to cover an existing loss, it should seem that if the coals were even latently on fire at the

time the policy was effected, and this unknown to the insured, yet the policy would be void, and therefore an averment of notice and fraud is unnecessary, and not traversable.

the making of the said deed-poll or policy of assurance, and of the insuring thereof as aforesaid, were of an inflammable nature and quality, and that the insurance, so as aforesaid made thereon, was more hazardous than insurances above in this plea particularly mentioned and described, and were specially hazardous, to wit, at, &c. aforesaid; yet the said defendants further say, that such special hazard was not inserted in the said deed-poll or policy of assurance. By reason whereof the said deed-poll or policy was and is null and void, to wit, at, &c.; and this they the said defendants are ready to verify, wherefore, &c. And for a further plea in this behalf, as to the supposed breach of covenant above assigned, the said defendants [*actio non*] because they say, that the said plaintiff did, at the time of the making, effecting, and obtaining of the said deed-poll or policy of assurance, and so as aforesaid insuring his said stock of coals as aforesaid, cause the same to be described otherwise than as it then really was, so that the same was insured at a lower premium than the said special hazards in the said printed proposals above-mentioned, did require, to wit, at, &c. (*venue*) aforesaid. By reason whereof the said deed-poll or policy was void and of no force, to wit, at, &c. (*venue*) aforesaid; and this they the said defendants are ready to verify, wherefore, &c. And for a further plea in this behalf, as to the supposed breach of covenant above assigned, the said, &c. [*actio non*] because they say, that the said, &c. at the time of the making, effecting, and obtaining of the said deed-poll or policy of assurance, and in so as aforesaid insuring his said stock of coals as aforesaid, cause the same to be described otherwise than as it really was, so that the same was insured at a lower rate than was proposed in the aforesaid table of premiums, to wit, at, &c. (*venue*) aforesaid; and this they the said defendants are ready to verify, wherefore, &c.

ON POLICIES OF INSURANCE

[\*1012]

Plea, that goods were wrongfully described, and were so insured at a less premium than they ought to have been. Plea, that goods were described, otherwise than they really were.

Person and others. )  
ats.

Holehouse. )

And the said defendants, by — their attorney, say, that the said deed-poll or policy of insurance, in the said first part of the said declaration mentioned, and the said deed-poll or policy of insurance, in the said second count of the said declaration mentioned, are and are one and the same deed-poll or policy of insurance, and not two or different; and they crave oyer of the said deed-poll or policy of insurance, and it is read to them, and they also crave oyer of the conditions upon which the said company make insurances, which said conditions referred to by the said deed-poll or policy of insurance, and indorsed upon, and they are read to them in these words, that is to say, Conditions upon which this company make insurances.—[*First*, Persons desirous of making insurance on buildings are to deliver into the office the following particulars, viz. a description of the buildings; where situated; by whom insured; of what materials the walls and roof of each building intended to be insured are composed; \*whether the same are occupied as dwellings, or as warehouses, manufactories, workshops, or how otherwise; and, not duly separated by party walls, are deemed brick and timber; and manufactories which contain furnaces, kiln, stores, coal-kels, ovens, or otherwise use fire and heat, are chargeable at additional rates.—*Second*,

First plea (after craving oyer of and setting out conditions of insurance) *non est factum*.

[\*1018]

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INSURANCE.

In the insurance of goods, wares, merchandize, the building or place in which the same are deposited is to be described; it must also be stated whether such goods be of the kind denominated hazardous, and whether any manufactory is carried on in the premises; and if any person or persons shall insure his or their building or goods, and shall cause the same to be described in the policy otherwise than they really are, so as the same be charged at a lower premium than is here specified as applicable thereto, or if any building shall contain any kiln, furnace, steam-engine, stove, or oven, used in the process of any manufactory, unless mention be made thereof in the policy it shall also be void in respect of such buildings, and the goods therein.—*Third*, That no loss or damage by fire occasioned by invasion, foreign enemies, civil commotion, or any military or usurped power, will be assured or made good, or considered as insured, by this company.—*Fourth*, Persons insuring property at this office, must give notice of any other insurance made by or on their behalf in the same property; whether such other insurance shall be made previous or subsequent to that which is made at this office; and such other insurance is to be indorsed on the policies, subscribed on behalf of this company, and entered at their office, otherwise this company will not hold themselves liable to pay in case of loss, and after such indorsement is made this company will pay their ratable proportions of any loss or damage by fire subsequently sustained.—*Fifth*, Leaseholders, trustees, mortgagees, persons entitled to houses and buildings in reversion, may insure their respective interests in such buildings, provided the nature of the tenure or interest therein be duly specified, and this office will fully reinstate all damages to buildings insured, or pay the amount, not exceeding the sum named.—*Sixth*, Upon the death of any person insured at this office, the policy interest therein may be continued to their executors or administrators respectively, or be transferred to the person who shall, upon such death be entitled to the property insured, provided such heirs, executor, or administrator, or other person so entitled, do procure his or her interest therein to be indorsed on the policy "at the office of the company; that persons changing their dwelling-houses, shops, or warehouses, may preserve the benefit of their policies, if the nature and circumstance of the risk insured be not altered; but in all such cases the policy is not to be considered as remaining in force until the nature of the removal or alteration be given at the office of this company, and the same to be made by the company upon the policy.—*Seventh*, All persons named by this company, who shall sustain any loss or damage by fire, are forthwith to give notice thereof to the company at their principal office in London, and as soon as possible afterwards are to deliver in as particular an account of their loss or damage, as the nature of the case will admit of, and shall make proof of the same by their oath or affirmation, and produce such other evidence as the directors of this company may reasonably require, and until such affidavit and affirmation, and account are produced, the amount of such loss, or any part thereof, shall not be payable or recoverable; and if there appear any fraud in the claim made to such loss, false swearing or affirming in support thereof, the claimant shall forfeit his claim to payment thereof by virtue of his policy.—*Eighth*, In case any difference or dispute shall arise between the assured and the company,

[\*1014]

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eaching the amount or extent of any loss or damage, such difference shall be submitted to the judgment or determination of arbitrators, indifferently chosen, whose award in writing shall be conclusive and binding to all parties; and when any loss or damage shall have been duly proved and ascertained, the insured shall immediately receive satisfaction to the full amount of the same, without any deduction or discount whatsoever.—*Ninth*, septennial insurers. Persons choosing to insure for seven years will be charged for six years only; also for any number of years less than seven will be allowed reasonable discount both upon the premium and the duty.

—*Tenth*, Insurances may be made for any period less than twelve months.

—*Eleventh*, No receipts are to be taken for any premium of insurance but such as are printed and issued from the office, witnessed by one of the clerks or agents of the office. All expenses attending the removal of goods, insured in this office, out of any house or premises on fire, or out of any house or premises adjoining or contiguous to any building on fire, will be cheerfully repaid.] Which being read and heard, the

said defendants say, that the said, &c. [*non est factum, as ante*, 1001,] and of this they put themselves upon the country, &c. [*Second*

*plea to first count, actio non.*].—Because they say, that the said plaintiff

did not, at the time of making the said policy of insurance in that count

mentioned, and at the time of paying the said sum of, &c. in that count

also mentioned, give notice to the said company at the said office of the

said other insurance theretofore made at the Imperial Fire-Office, as in

the said second count is mentioned, according to the form and effect of

the said fourth condition referred to by and indorsed upon the said deed-

poll or policy of insurance; and this, &c. [*verification.*].—[*Third plea to*

*first count, actio non.*].—Because they say, that they the said defendants

did not in any manner waive, relinquish, release or discharge the said

plaintiff from indorsing the said insurance in the said British Fire-Office,

in the said deed-poll or policy of insurance, in the said first count men-

tioned, and for entering the same at the said office, in that count first

mentioned, in manner and form as the said plaintiff hath in that count alled-

ged; and of this they the said defendants put themselves upon the country,

&c. [*Fourth plea to first count, actio non.*].—Because they say, that the

said utensils and stock in trade, in the said first count mentioned, were

not duly described in the building and place where the same were depos-

ited, but the same were described in the said policy otherwise than they

really were, and so as to cause the said insurance to be effected at a lower

premium than ought to have been, contrary to the form and effect of the

said condition referred to by, and indorsed on the said deed-poll or policy

of insurance; and this the said, &c. is ready to verify, wherefore, &c.

—[*Fifth plea to first count, actio non.*].—Because they say, that the said

utensils and stock in trade, in the said first count mentioned, and therein

supposed to have been burnt, consumed, lost, and destroyed by fire, were

not, nor was any part thereof burnt, consumed, lost, or destroyed by fire,

in manner and form as the said, &c. hath in that count alleged; and of

this, &c. [*Sixth plea to first count, actio non.*].—Because they say, that

the said, &c. did not give notice of the loss she had sustained to the com-

pany at their said principal office in London, and that the said, &c. did not,

as soon as possible afterwards, deliver at the said office as particular an

account of her said loss or damage as the nature of the case would admit

of, in manner and form as the said plaintiff hath above in that count

[\*1015]

Second  
plea, the  
plaintiff  
did not  
give notice  
of having  
insured at  
another of  
five con-  
trary to  
fourth con-  
dition.

Third plea,  
that de-  
fendant did  
not waive  
the notice.

Fourth  
plea, that  
buildings,  
goods, &c.  
were not  
duly de-  
scribed.

Fifth plea,  
that goods,  
&c. were  
not burnt.

Sixth plea,  
that plain-  
tiff did not  
give due  
notice of,  
or duly  
prove the  
loss.

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Seventh  
plea, that  
plaintiff  
did not as  
soon as  
possible  
deliver in  
a particu-  
lar account  
of loss, and  
that there  
was fraud  
within the  
seventh  
condition.

Eighth  
plea, that  
plaintiff  
made a  
false affi-  
davit of  
the loss,  
&c.

[\*1017]

Ninth plea,  
that plain-  
tiff was re-  
quested by  
directors  
to deliver  
in a particu-  
lar account  
of loss, but  
refused,  
contrary to  
seventh  
condition.

Tenth plea,  
that stock,  
&c. was  
improperly

alleged; nevertheless, for plea in "this behalf, the said, &c. in fact, say, that although the said plaintiff did make oath of the said loss, and did then and there produce her books, documents, vouchers, and other evidence, at the request of the directors of the said company, then and there being a reasonable request in that behalf; yet the said plaintiff did not duly, properly, and reasonably, prove her said loss and damage according to the form and effect of the said seventh condition, referred to by and indorsed on the said deed-poll or policy of insurance; and this they the said, &c. are ready to verify, wherefore, &c. [*Seventh plea to first count, actio non.*].—Because they say, that the said A. did not, as soon as possible after the said loss and damage in that count mentioned, deliver in as particular an account of such loss or damage as the nature of the case would admit of, in manner and form as the said plaintiff hath above in that count alleged; nevertheless, for plea in this behalf, the said &c. say, that in the claim made for the said loss and damage, in the said count mentioned, and set forth, there appeared to be fraud within the true intent and meaning of the said seventh condition, referred to and indorsed on the said deed-poll or policy of insurance, that is to say, fraud in taking the quantity, nature, and value of the sugars, utensils, and other stock in trade, in that count supposed to have been burnt, consumed, and destroyed by fire, contrary to the said seventh condition, referred to by and indorsed on the said deed-poll or policy of insurance; and this, &c. [*verification.*] [*Eighth plea to first count, actio non.*].—Because they say, that the said, &c. in order to support her claim for the said loss of damage in that count mentioned, did, on, &c. before, &c. magistrate, at the public office, — in the county of — make a certain affidavit. And the said, &c. in fact, further say, that in support of the said claim for the said loss and damage in that count mentioned, there was false swearing within the true intent and meaning of the said seventh condition, referred to by and indorsed on the said deed-poll of policy of insurance, that is to say, false-swearing in this, to wit, the said, &c. then as there swore, that the amount annexed to the said affidavit contained true statement of the loss and damage of her the said, &c. whereas the said amount did not contain a true statement of the said loss and damage, contrary to the said seventh condition, referred to by and indorsed on the said deed-poll or policy of insurance; and "this the said, &c. [*verification.*] [*Ninth plea to first count, actio non.*].—Because they say, that the said &c. after the said loss and damage by fire, in that count mentioned, to wit, on, &c. at, &c. (*venue*) was required by the directors of the said company to deliver in an account of the said loss or damage, specifying such account the amount of the loss and damage suffered in the stock in trade and utensils in each distinct building of the said premises so insured in the said policy in that count mentioned, the same request then as there being a reasonable request in that behalf, but the said, &c. the said and there neglected and refused to deliver in such account as afore said, and hath not delivered the same to the directors of the said company, contrary to the form and effect of the said seventh condition, referred to by and indorsed on the said deed-poll or policy of insurance; and this, &c. [*Tenth plea to first count, actio non.*].—Because they say, that the said utensils and stock in trade, in the said deed-poll or policy of insurance, in the said last count mentioned, were not truly

described in the building and place where the same were deposited, but the same were described in the said policy otherwise than they really were, and so as to cause the said insurance to be effected at a lower premium than ought to have been, contrary to the form and effect of the said second condition, referred to and indorsed on the said deed-poll or policy of insurance; and this, &c. [verification.] [The eleventh plea was to the second count, and the same as the fifth plea. The twelfth plea to second count, *actio non*.]—Because they say, that the said utensils and stock in trade in the said sugar-house, in the said last count mentioned, were, before the making of the said deed-poll or policy of insurance, insured for a certain large sum of money, to wit, the sum of £— in a certain office called the British Fire-office, being another office than that mentioned in the said deed-poll or policy of insurance, to wit, at London aforesaid, in the parish and ward aforesaid; and that the said, &c. did not give notice of such insurance to the said company at their said office, neither did she cause the same to be indorsed upon the said deed-poll or policy of insurance, but on the contrary thereof altogether neglected so to do, to wit, &c. (*venue*) aforesaid, contrary to the form and effect of the fourth condition, referred to by and indorsed upon the said deed-poll or policy of insurance; and this, &c.—[There were other pleas to the second count, similar to the above pleas to the first count.]

ON POLICIES OF INSURANCE

described, whereby insured at a lower premium, contrary to second condition. Twelfth plea to second count, that the premises were insured in another office, and no notice duly given to defendant's office.

'And the said defendant by E. F. his attorney, comes and defends the wrong and injury, when, &c. and saith that the said plaintiff ought not to sue or maintain his aforesaid action thereof against him, to recover any more or greater damages than the said sum of [£5] because he saith that the said defendant was present at the said demised dwelling-house and premises, on the said — day of — A. D. — being the day on which the said sum of [£5] became due and payable, as aforesaid, for a reasonable and long space of time, to wit, for the space of three hours next before the setting of the sun in the same day, being a convenient and sufficient time before the setting of the sun on that day for the counting of the money with which the said defendant wished and intended to pay the rent aforesaid; and also at and for a reasonable and long time after the setting of the sun in the same day, and during all the time aforesaid, was there ready to pay, and offered to pay the said [£5] to the said plaintiff, but that neither he the said plaintiff nor any other person on his behalf, during the said time, or any part thereof, was there ready to receive the same; and the said defendant further saith, that he the said defendant has always since that day, at, &c. (*venue*) aforesaid, been and still is ready to pay the same to the said plaintiff, and the said defendant now brings the said sum of [£5] here into court ready to be paid to the said plaintiff if he will accept the same. And this he the said defendant is ready to verify, wherefore he prays judgment if the said plaintiff ought to have or maintain his said action thereof against him to recover any more or greater damages than the said sum of [£5] in this behalf, &c.

ON LEASES IN GENERAL.

[\*1018] Plea to covenant for rent, a tender on the land before sunset (n).

(n) See the form, Plead. A. 841.—2 Rich. 42.—And as to the law, see 4 Taunt. Abr. Tender H. 1. The tender of money must be on the land unless otherwise

stipulated, 1 Bac. Ab. 670; Condition, P. 4. See observations, ante, 992, as to pleading *rien en arriere* and accord and satisfaction, see ante, vol. i. Index, "Lease."

ON LEASES  
IN  
GENERAL.  
Plea that  
lessor was  
seised for  
life, and  
not in fee  
(n).

[*Actio non, as ante, 906.*].—Because he saith, that the said E. F. deceased, at the time of the making of the said indenture "was seised only in his demense, as of freehold, for the term of his natural life, of and in the said demised premises, with the appurtenances, and continued so seised thereof, until and at the time of his death, and that after the making of the said indenture, and before the expiration of the said term, to wit, on, &c. at, &c. (*venue*) aforesaid, the said E. F. died; whereupon the said indenture, and the term thereby created wholly ceased and determined; without this, and at the time of the making of the said indenture, the reversion of and in the said demised premises, with the appurtenances belonging to the said E. F. and his heirs, in manner and form as the said plaintiff hath above in his said declaration in that behalf alleged. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

Plea by  
assignee,  
traversing  
the assign-  
ment to  
him (o).

[*Actio non, as ante, 906, first form.*].—Because he saith, that all the estate, right, title, interest, and term of years then to come and unexpired, property, claim, and demand whatsoever of the said E. F. of and in the said premises, with the appurtenances, by assignment thereof duly made, did not come to and vest in the said defendant in manner and form as the said plaintiff hath in his said declaration in that behalf alleged. And of this he the said defendant puts himself upon the country, &c.

Premises  
not out of  
repair (p).

[*Actio non, as ante, 906, first form.*].—Because he saith that [*here deny the breach in the words assigned in the declaration, which may perhaps be thus:*] the said messuage and tenement, farm-house, and out-houses thereunto belonging, were not, nor are, nor was, nor is any part thereof ruinous, prostrate, fallen down, or out of repair, in manner and form as the said plaintiff hath above thereof complained against him the said defendant, and of this he the said defendant puts himself upon the country, &c.

Plea under  
6 Geo. 4.  
c. 16, s. 75.  
to a declara-  
tion in  
covenant,  
for rent,  
&c. that  
the assign-

[*Actio non, as ante, 906.*].—Because he saith, that, &c. [*here set out the defendant's being a trader, the petitioning creditor's debt, the act of bankruptcy, the commission issued, and the defendant's being found a bankrupt, as ante, 913, and leave out, at the commencement of the averment, as to notice in the Gazette*] and the said defendant further saith, that afterwards,

(n) See 2 Wils. 143; in which, to covenant by an heir, a similar plea was held sufficient on demurrer, and see form, 8 T. R. 488.—1 New Rep. 160. A lessee or assignee cannot plead *nil habuit* or a general traverse of the lessor's estate, or that he had only an equitable interest, but he may show that the lessor was entitled to a different estate, see 2 Stra. 817.—8 T. R. 487.—1 New Rep. 160.—2 Saund. 207 b. 418, note 1.—Chit. jun. on Contracts.—Ante, vol. 1. Index, "*Lease*," as to what plea of this nature defendant may plead, see 4 Moore, 303.—2 Bing. 54, 10, and cases there collected.

(o) The words of the traverse of the assignment are to be in the negative of that part of the declaration. As to when this plea cannot be pleaded to an action of covenant, 4 Taunt. 642. If the defendant be assignee of part only, he should plead in abatement, 5 B. & C. 479, or plead in bar only as to one undivided

share, per Littledale, J.—5 B. & C. 484. See a plea by a lessee of a surrender, 5 Taunt. 27. In an action by a revisioner against assignees of a bankrupt for several breaches of covenant in a lease, the Court of Common Pleas refused to allow the defendants to plead *non est factum*, and also that the premises did not come to them by assignment, 2 M. & P. 19.

(p) See form, Plead. A. 816.—Morg. 489. The plea to a breach of covenant for not repairing should be conformable to the breach, and may be either that the defendant did repair, &c. in the words of the covenant, or that the premises were not out of repair, as above in the negative of the breach, usually assigned in the declaration. It seems preferable to plead that defendant did repair, and that the premises were not dilapidated, negating the breach, as assigned in the declaration.



and before the exhibiting of the bill of the said plaintiff, to wit, on, &c. the said defendant remaining and continuing a bankrupt, the said A. B. and C., three of the commissioners named in the said commission, by certain indentures then and there made between the said A. B. and C. of the one part, and C. D. and E. F. of the other part, then and there being creditors of the said defendant, and sealed with the seals of the said A. B. and C., bargained, sold, assigned, and transferred, unto the said C. D. and E. F. [*set out the words of assignment*] upon trust, nevertheless, to and for the use and benefit of the said C. D. and E. F. and all other creditors of the said defendant who then had demanded, or who afterwards should in due time come in and demand £— and relief, by virtue of the said commission, and should contribute towards the expense of the same, according to the limitation of the aforesaid statute; and the said defendant further saith, that afterwards, &c. [*here state the notice in the Gazette, defendant's surrender and examination, defendant's conformity, as ante, 915.*] and the said defendant further saith, that before any part of the said rent in the said declaration mentioned, became due and in arrears, and also before the committing of the said supposed breaches of covenant in the said declaration "assigned, to wit, on, &c. at, &c. (*venue*)" the said C. D. and E. F. so being assignees of the estate and effects of the said defendant, as such bankrupt as aforesaid, accepted the said lease so granted by the said plaintiff to the said defendant, and the benefit therefrom, as part of the said bankrupt's estate and effects, according to the form of the statute in such case made and provided; and the said defendant then and there, and before the committing of either of the said breaches of covenant in the said declaration mentioned, became and was wholly discharged from liability to be in any manner sued in respect or by reason of any subsequent non-observance or non-performance of the condition, covenants, or agreements, in the said lease contained. And this, &c.—[*Conclude with a verification, as ante.*]

ON LEASES  
IN  
GENERAL.ees of de-  
fendant  
(bankrupt  
accepted  
the lease  
(r).

[\*1020]

See the plea to debt on leases, &c. ante, 992 to 994, which may readily be adapted to the action of covenant, and see the great variety of pleas in covenant on different deeds, indexed in 5 Wentw. Index, cxxvii. to cxliv. and Com. Dig. Pleader, vol. ii. 4 to 18. Pleas in covenant so much depend on the particular facts of each case, that it would not be practicable, in a concise collection of *Precedents* of this nature, to give forms in every case.

OTHER  
PLEAS IN  
COVENANT

A. D. )  
B. ) "And the said defendant by E. F. his attorney, comes and de- [\*1021]  
fends the wrong and injury, when, &c. and as to the said supposed breach of covenant first above assigned, so far as the same relates to £8, (*the sum tendered.*) parcel of the said sum of £50, in the said declaration mentioned, saith, that the said A. B. ought not to have or maintain his aforesaid action thereof against him, to recover any more or greater damages than the said sum of £8, on occasion of the said supposed breach of covenant in this behalf, because he saith, that, after the time

TENDER.  
Tender as  
to part (r).

(g) As to this defense, see the statute and Moore, 200, S. C.—5 Mod. 18.—1 Lord Raym. 566.—12 Mod. 376.—Ante, vol. i. index.  
(r) A tender may be pleaded in covenant "Tender;" but see Gilb. C. P. 63.—Gilb. Debt. 484; 448, *semble contra*.

## TENDER.

when the said sum of £8, parcel, &c. became due and payable from the said defendant, and before the exhibiting of the bill of the said plaintiff against the said defendant in this behalf, [or, if in *C. P.* or, by original, "before the commencement of this suit,"] to wit, on the — day of — A. D. — at, &c. (*venue*) aforesaid, he the said defendant was ready and willing, and then and there tendered and offered to pay to the said plaintiff the said sum of £8, parcel, &c., to receive which of the said defendant he the said plaintiff then and there wholly refused; and the said defendant further saith, that he the said defendant hath always, from the time when the said sum of £8, became due and payable, hitherto, at, &c. (*venue*) aforesaid, been ready to pay and still is there ready to pay to the said plaintiff the said sum of £8, parcel, &c. and he now brings the same here into court, ready to be paid to the said plaintiff, if he will accept the same. And this he the said defendant is ready to verify, wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him to recover any more or greater damages than the said sum of £8, on occasion of the said supposed breach of covenant first above assigned in this behalf, &c.—[*Set-off, as to the residue of the money breach, as next form.*]

## SET-OFF.

And the said defendant, as to the supposed breach of covenant first above assigned, [*this must be according to the fact, a set-off can only be pleaded to a breach of covenant to pay money.*] says [*actio non, as ante, 906, first form.*].—Because he saith, that the said plaintiff, before and at [\*1022] the time of the commencement of this suit, was and still is indebted to the said defendant in a large sum of money, to wit, the sum of £— for &c. [*here state the subject-matter of the set-off as in forms, ante, 984 & 989.*] to wit, at, &c. (*venue*) aforesaid, which said sum of money so due and owing from the said plaintiff to the said defendant exceeds the damages sustained by the said plaintiff on occasion of the said supposed breach of covenant first above assigned as to the said sum of £— and out of which said sum of money so due and owing from the said plaintiff to the said defendant, as aforesaid, he the said defendant is ready and willing, and hereby offers to set off and allow to the said plaintiff so much as will be sufficient to satisfy the damages by him sustained on occasion of the said supposed breach of covenant first above assigned, according to the form of the Statute in such case made and provided, &c. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

## •IN DETINUE.

*In the King's Bench (or, "C. P." or, "Exchequer.")*

— Term, — Will. 4.

General  
issue, non  
detinet (s).

C. D. )

ata. } And the said defendant by E. F. his attorney, comes and de-  
A. B. } fends the wrong and injury, when, &c. and saith that he doth not  
detaim the said [goods and chattels] in the said declaration specified, or  
any or either of them, or any part thereof, in manner and form as the said  
plaintiff hath above thereof complained against him, and of this he the  
said defendant puts himself upon the country, &c.

[*First plea, non detinet.*].—And for a further plea in this behalf, the  
said, &c. by leave, &c. say, that the said, &c. [*actio non.*].—Because they  
say that the said, &c. (the bankrupt) was not lawfully possessed of the  
said indenture, in the said declaration mentioned, or either of them, in  
manner and form as the said plaintiff hath above, in his said declaration in  
that behalf alleged, and of this they the said defendants also put themselves  
upon the country, &c. And for a further plea in this behalf, as to the de-  
taining the said indenture of lease in the said declaration first mentioned,  
the said defendants, by like leave of the court, [*actio non.*].—Because  
they say, that the said last-mentioned indenture, heretofore, to wit, on the  
said, &c. aforesaid, at, &c. (*venue*) aforesaid, was, by and with the privy  
ty and consent of the said, &c. made and executed to him the said, &c.  
in trust for, and to and for the use and benefit of one, &c. since deceased,  
in her life-time, and that the said, &c. did accordingly, after the execution  
of such indenture, to wit, on, &c. aforesaid, at, &c. (*venue*) aforesaid, de-  
liver the said last-mentioned indenture to the said, &c. to be by her had  
and held, and used and disposed of, to and for her own use and benefit,  
and in such a way and manner as she should think proper; and the said,  
&c. further say, that the said last-mentioned indenture remaining and con-  
taining in the custody and possession of the said, &c. for the purpose  
aforesaid, she the said, &c. afterwards, and before the commencement of  
this suit, to wit, on, &c. at, &c. (*venue*) aforesaid, delivered the said  
last-mentioned indenture to and deposited and lodged the same with them  
the said defendants, to be by them kept as a pledge and security, for and  
until the payment of all such sum or sums of money as were then due, or  
might thereafter become due, to them the said defendants, for the goods  
by them furnished and supplied to the said E. N.; and the said defendants  
further say, that certain sums of money, amounting in the whole to a large  
sum of money, to wit, the sum of £— remain and still are wholly due and  
 unpaid to them the said defendants, for goods by them furnished and sup-  
plied to the said E. N., to wit, at Westminster, aforesaid, &c. and a great  
part of which said goods were so furnished and supplied by them the said,  
&c. after the delivery of the said last-mentioned indenture to them as afore-

Plea, that  
the person  
under  
whom  
plaintiff  
claims,  
was not  
lawfully  
possessed  
of the in-  
denture.  
Plea, that  
the inden-  
ture was  
executed  
in trust for  
a third per-  
son, and  
was deliv-  
ered to her  
to dispose  
of as she  
might  
think fit,  
and she  
pledged it  
as defend-  
ant's for  
valuable  
considera-  
tion.

[\*1024]

(s) See the forms of different pleas in de- te, vol. i. Index, "*Detinue*" and Com. Dig.  
tinue, 7 Wentw. 637, 647 to 662; and see an- Pleader, 2 X. 3, &c.

IN  
DETINER.  
Plea, that  
the lessee  
assigned  
the inden-  
ture to an-  
other per-  
son, who  
pleaded it  
with de-  
fendants.

Plea, that  
the lessee  
delivered  
the inden-  
ture to a  
third per-  
son, to be  
disposed of  
by her as  
she should  
think fit,  
and that  
she pledg-  
ed it with  
defend-  
ants.

[\*1025]

Plea, stat-  
ing several  
deliveries  
of the  
lease, and  
a deed of  
trust,  
whereby  
one of de-  
fendants  
was ap-  
pointed  
trustee,  
and he in  
his own  
right, and  
the other  
defendant

*said, and upon the faith and security thereof*; wherefore the said, &c. de-  
tain the said last-mentioned indenture, as they lawfully may for the cause  
aforesaid, and this they the said, &c. are ready, &c. And for a further  
plea in this behalf, as to detaining the said indenture of lease in the said  
declaration first mentioned, the said, &c. by like leave, &c. according,  
&c. say, [*actio non.*] Because they say, that after the making of the said  
last-mentioned indenture, to wit, on the, &c. aforesaid, at, &c. (*venue*)  
aforesaid, the said, &c. for a certain good and valuable consideration in  
due form of law *delivered, assigned and transferred, and set over* the said  
last-mentioned indenture, and all his the said, &c. right and interest there-  
in to the said E. N., and then and there delivered the said last-mentioned  
indenture to the said E. N.; and the said defendants further say, that the  
said E. N. in her life-time afterwards, and before the commencement of  
this suit, to wit, on, &c. aforesaid, &c. at, &c. (*venue*) aforesaid, deliv-  
ered the said last-mentioned indenture to, and deposited and lodged the  
same with them the said defendants, to be by them kept as a pledge and  
security for and until the payment of all such sum and sums of money as  
were then due, or might thereafter become due, to them the said, &c. for  
goods by them furnished and supplied to the said E. N. and this, &c.  
And the said defendants further say, &c. [*same as last plea to the end*  
*leaving out the lines in italics*], and for a further plea as to the detaining  
of the said indenture "in the said declaration first mentioned, the said de-  
fendants, by like leave, &c. say [*actio non.*]"—Because they say, that  
after the making of the said last-mentioned indenture, to wit, on, &c. at,  
&c. (*venue*) aforesaid, the said plaintiff, for a certain good and valuable  
consideration, delivered the said last-mentioned indenture to the said E. N.  
to be by her had and held, and used and disposed of, to and for her own  
use and benefit, and in such way and manner as she should think proper;  
and the said defendants further say, that the said last-mentioned indenture  
remaining and continuing in the custody and possession of the said E. N.  
for the purpose last aforesaid, the said E. N. afterwards, and before the  
commencement of this suit, to wit, on, &c. at, &c. (*venue*) aforesaid, de-  
livered the last-mentioned indenture to, and deposited and lodged [*same*  
*as the plea, ante, 1023, from the asterisk, to the end.*]

[*Same plea like the former, except putting the name G. N. instead of E.*  
*N.*]"—And for a further plea, &c. as to the detaining the said indenture of  
lease, in the said declaration first mentioned by the said defendants, by like  
leave, &c. [*actio non.*]"—Because they say, that the said last-mentioned in-  
denture, heretofore, to wit, on, &c. at, &c. (*venue*) aforesaid, was, by and  
with the privity and consent of the said plaintiff, made and executed to him  
the said plaintiff, in trust for, and to and for the use and benefit of one E.  
N. in her life-time, and that the said plaintiff did accordingly, after the  
execution of such indenture, to wit, on, &c. aforesaid, at, &c. (*venue*)  
aforesaid, deliver the said last-mentioned indenture to the said E. N. to  
be by her had and held, and used and disposed of, in such way and manner  
as she should think proper; and the said defendants further say, that  
the said last-mentioned indenture remaining and continuing in the cus-  
tody and possession of the said E. N. for the purpose last aforesaid

the said E. F. afterwards, to wit, on, &c. aforesaid, at, &c. (*venue*) aforesaid, delivered the said last-mentioned indenture to the said G. N. to be by him had and held, and used and disposed of, to and for his own use and benefit, and in such way and manner as he should think proper; and the said defendants further say, that the said last-mentioned indenture remaining and continuing in the custody and possession of the said G. N. for the purpose last aforesaid, and the said G. N. being indebted as is hereinafter mentioned, he the said G. N. afterwards, and before \*the commencement of this suit, to wit, on the, &c. at, &c. aforesaid, for a certain good and valuable consideration in due form of law assigned, transferred, and set over (amongst other things) the said last-mentioned indenture, and all his the said G. N.'s right and interest therein, to one J. G. and the said, &c. in trust (amongst other purposes) to sell and dispose of the said last-mentioned indenture, and to pay and apply the produce thereof unto and amongst certain other creditors of the said G. N. whose names and seals were and are respectively subscribed and set to a certain indenture, bearing date the day and year last aforesaid, and made between the said G. N. of the first part, the said, &c. and the said, &c. as creditors of the said E. N. deceased, the late wife of the said G. N. or of the said G. N. in respect of debts contracted by his said late wife, as mentioned in the said last-mentioned indenture of the second part, and the several other persons whose names and seals were thereto subscribed and set, also creditors of the said E. N. or G. N. of the third part, in satisfaction and discharge of their said several debts, and then and there delivered the said indenture, in the introductory part of this plea mentioned, to the said J. J. and the said W. as such trustees as aforesaid; and that the said J. J. and W. then and there had and received the said last-mentioned indenture accordingly, and then and there accepted and took upon them the execution of the trusts upon which the same was so assigned as aforesaid; and the said defendants further say, that the said last-mentioned indenture hath not been as yet sold or disposed of by them, the said J. J. and W. or either of them, for the payment whereof the same was assigned as aforesaid, nor have the said defendants been as yet paid or satisfied, but the same are still wholly due and owing (to wit,) at Westminster aforesaid, in the county aforesaid; wherefore the said W. as one of such trustees as aforesaid, in his own right, and the said J. M. as his servant, and by his command detains the said last-mentioned indenture as they lawfully may for the cause aforesaid; and this, &c.

IN  
DETINUE.

as his servant, justifies detention of the lease.

[\*1026]

[Plea by W. only, same as the former, leaving out the words in italics.] And for a further plea in this behalf, as to the detaining the said indenture of lease in the said declaration first mentioned, the said W. and J. M. by like, &c. say, [*actio non.*].—Because they say, that after the taking of the said last-mentioned indenture, to wit, on the said, &c. aforesaid, at, &c. (*venue*) aforesaid, the said plaintiff, for a certain good and valuable consideration, delivered the said last-mentioned indenture to the said G. N. to be by him held and used, and disposed of to and for his own use and benefit, in such way and manner as he should think proper; and the said W. and J. M. further say, that the said last-mentioned indenture, remaining and continuing in the custody and possession of the said G. N.

Plea, by one of defendants, that the lessee assigned the indenture to another person, who assigned the same to defendants.

[\*1027]

IN  
DETINUE.

for the purpose last aforesaid, he the said G. N. afterwards, and before the commencement of this suit, to wit, on the said, &c. at, &c. (*venue*) aforesaid, for a certain good and valuable consideration, in due form of law assigned, transferred, and set over (amongst other things) the said last-mentioned indenture, and all his the said G. N.'s right and interest therein, to one J. J. and the said W., and then and there delivered the said last-mentioned indenture to the said J. J. and W.; wherefore the said W. in his own right, and the said J. M. as his servant and by his command, detain the said last-mentioned indenture, as they lawfully may, for the cause last aforesaid; and this, &c. [*Ninth plea, by W. only, in other respects same as the former.*]

Plea to an action of detinue by assignees, that deeds in declaration mentioned were deposited by bankrupt in defendant's hands, as security for a debt.

[*First plea, non detinet; second plea, actio non.*—Because he says, that heretofore, and before the said E. F. became bankrupt, to wit, on, &c. at, &c. (*venue*) a certain large sum of money, to wit, the sum of £— of lawful, &c. was then and there due and owing from the said E. F. to the said defendant, and the said sum of money so being due and owing, it was then and there agreed, by and between the said E. F. and the said defendant, that in consideration thereof, and of the forbearance of the said sum of money as hereinafter mentioned, the said E. F. would deposit with the said defendant the said deeds and securities in the said first count mentioned, as a security for the repayment of the said sum of £— by the said E. F. to the said defendant, and that the said defendant should hold and detain the said deeds and securities till the said sum of £— should be so repaid, and the said defendant further saith, that afterwards, to wit, on, &c. last aforesaid, at, &c. (*venue*) aforesaid, the said E. F. in pursuance of such agreement, did deposit with the said defendant the said deeds and securities for the purpose aforesaid; and the said defendant further saith, that the said sum of £— hath not, at any time, been repaid to the defendant, \*but the same hath from thenceforth hitherto been forborne by the said defendant, and the same is still wholly due, in arrear, and unpaid to him the said defendant, to wit, at, &c. (*venue*) aforesaid, for which reason he the said defendant hath from thence hitherto detained, and still detains, the said deeds and securities, as he lawfully may for the cause aforesaid, and this he the said defendant is ready to verify; wherefore he prays judgment if the said plaintiff, assignee as aforesaid, ought to have or maintain his aforesaid action thereof against him, &c.—[And as to the said several other counts of the said declaration (debt on simple contract), the said defendant saith (*non debet*), &c.]

[\*1028]

Plea to detinue at suit of assignees, that the party did not become bankrupt. Plea that bankrupts were not possessed of, &c. as of their own, &c.

[*Actio non.*—Because they say, that the said E. F. and G. H. did not become bankrupts, according to the force, form, and effect of the several statutes concerning bankrupts, in manner and form as by the said declaration is supposed, and of this they the said defendants put themselves upon the country, &c. [*Second plea, non detinet; actio non.*—Because they say, that the said E. F. and G. H. before they became bankrupts, were not lawfully possessed of the said bills of sale in the said first count of the said declaration mentioned, or either of them, as of their own proper bills or bill of sale, in manner and form as the said plaintiffs have above complained against them; and of this, &c. [*Actio non.*—Because they

(1) A lien must be pleaded, ante, vol. i. Index, "*Detinue*." "*Lien*."

say, that the said E. F. and G. H. did not, after he became bankrupt, deliver the said bills of sale in the said first count of the said declaration mentioned, or either of them, to them the said defendants, in manner and form as in the aforesaid first count of the said declaration is alleged; and of this, &c. And for a further plea in this behalf, as to retaining the said bills of sale in the first count of the said declaration mentioned, by like leave, &c. [*Actio non.*]—Because they say, that the said, &c. before they became bankrupts, to wit, on, &c. at, &c. (*venue*) aforesaid, *were lawfully possessed of and entitled unto one moiety, half part, or share of the said ship called the —, in the said first count of the said declaration mentioned as of their own proper goods and chattels and being so possessed and entitled*, by a certain indenture then and there made between, &c. before they became bankrupts, of the one part, and the said, &c. the elder, &c. the younger, and, &c. of the other part, (one part of which said indenture, sealed with the seal of the said, &c. and, &c. the younger, and, &c. the said defendants "now bring here into court, bearing date the same day and year last aforesaid), *they the said, &c. for a certain good and valuable consideration therein mentioned*, in due form of law granted, bargained, sold, assigned, transferred, and set over unto the said, &c. the elder, &c. the younger, &c. all their said half-part or share, right, title and interest of, in, and to the said ship called the — to hold the same to them the said, &c. the elder, &c. the younger, and, &c. as their own proper goods and chattels, and to their own proper use for ever, as by the said indenture more fully appears; and the said, &c. *upon the execution of the said indenture*, and before they became bankrupts, to wit, on the same day and year last aforesaid, at, &c. (*venue*) aforesaid, delivered the said bills of sale, in the said first count of the said declaration mentioned, *being bills of sale of the said ship or vessel called the —* unto them the said defendants, to be kept by them as the evidence of their title to the said moiety or half part or share of the said ship; wherefore the said defendants, detain the same bills of sale as they lawfully may for the cause aforesaid; and this, &c. (*verification.*)

IN  
RETINUE.  
Plea, that  
&c. did  
not deliver  
to defend-  
ants the  
bills.  
Plea, that  
the bank-  
rupts as-  
signed  
over their  
interest in  
the ship,  
and that in  
the execu-  
tion of the  
deed of as-  
signment,  
the bank-  
rupts deliv-  
ered to defend-  
ants the  
bills of  
sale, as a  
collateral  
security.

[\*1029]

And for a further plea in this behalf, as to the detaining of the said bills of sale in the said first count of the said declaration mentioned, by like leave, &c. [*actio non*], because they say, that the said, &c. before they became, &c.—[*Same as the former plea to the end, only stating the deed of assignment to have been made*, "the said, &c. before he became a bankrupt, of the one part, and the said defendants of the other part," whereby he assigned his share.]

Plea, stat-  
ing that  
one of the  
bankrupts  
did as in  
fifth plea.

And for a further plea in this behalf, as to the said second count of the said declaration, by leave, &c. the said defendants say, that the said plaintiffs, [*actio non*], because they say the said plaintiffs, as assignees as aforesaid, after the said, &c. became bankrupts, were not lawfully possessed of the said bills of sale, or either of them, as in the said second count of the said declaration is alleged; and of this they put themselves upon the country.

Plea to  
second  
count,  
traversing  
the posses-  
sion of the  
plaintiff  
assignee.

•IN CASE. •

IN  
GENERAL.

General is-  
sue in case  
or trover,  
by one de-  
fendant  
(u).

*In the King's Bench* (or, "C. P." or, "*Exchequer*."). — Term, — Will. 4.

C. D. }  
ats. } And the said defendant, by E. F. his attorney, comes and de-  
A. B. } fends the wrong and injury, when, &c. and says, that he is not  
guilty of the said supposed grievances above laid to his charge, or any  
either of them, or any part thereof, in manner and form as the said plain-  
tiff hath above thereof complained against him. And of this he the said  
defendant puts himself upon the country, &c.

*In the K. B.* (or, "C. P." or "*Exchequer*.")

— Term, — Will. 4.

The like  
by several  
defendants

C. D. and others }  
ats. } And the said defendants, by — their attorney  
A. B. } come and defend the wrong and injury, when, &c.  
and say that they are not, nor is either of them, guilty of the said supposed  
grievances above laid to their charge, or any or either or any part there-  
of, in manner and form as the said plaintiff hath above thereof complain-  
ed against them. And of this they put themselves upon the country, &c.

Plea of  
general is-  
sue by so-  
licitor of  
customs,  
on behalf  
of the  
King, un-  
der 9 Geo.  
4. c. 26.  
(w).

And the said defendant, who has been duly appointed solicitor on be-  
half of his Majesty, under the directions of the commissioners of his Maj-  
esty's Customs, and who acts as such solicitor under such directions in  
this behalf, comes and defends the wrong and injury, when, &c. and says  
that he is not guilty of the said supposed grievances above laid to his  
charge, or any or either of them, or any part thereof, in manner and form  
as the said plaintiff hath above thereof complained against him. And of  
this he the said defendant puts himself upon the country, &c.

Plea con-  
fessing  
causes of  
action in  
certain  
counts,  
and cer-  
tain dama-  
ges there-  
by sustain-  
ed, and  
general is-  
sue to the  
residue  
(x).

And the said defendant, by — his attorney comes and defends the  
wrong and injury, when, &c. and as to the said [first and second] count  
of the said declaration mentioned, confesses the said action of the said  
plaintiff as to the said supposed grievances in those counts mentioned, and  
that he the said plaintiff, by means of the committing of the said grievances  
in those counts of the said declaration mentioned, hath sustained damage  
to the amount of £— over and above his costs and charges by him about  
his suit in that behalf expended, and which said sum of £— he the said de-

\* As to these pleas in general, see ante, vol. "Case."  
i. Index, "Case."  
(u) See form, 1 Rich. C. P. 148.—Morg.  
313. As to what may be given in evidence of this plea, ante, 909, note; for replication  
under this plea, see ante, vol. i. Index, see post, 1186.  
(w) See 6 Bing. 404.  
(x) See 1 Saund. 200, n. f; and see the use



defendant hath always been ready and willing, and is still ready and willing to pay to the said plaintiff. And the said defendant, as to the said [third and last counts] of the said declaration mentioned, says, that he is not guilty of the said supposed grievances in those counts mentioned, or any or either of them, or any part thereof, in manner and form as the said plaintiff hath above complained against him, and of this he puts himself upon the country, &c.

IN  
GENERAL.

In the K. B. (or, "C. P." or "*Exchequer*.)"

— Term, — Will. 4.

Statute of  
limitations  
(y).

[*First plea, general issue, as supra; second plea, actio non, as ante, 906, third form.*]—Because he says, that the said several supposed causes of action, in the said declaration mentioned, did not, nor did any or either of them, accrue at any time within six years next before the exhibiting of the bill of the said plaintiff, against the said defendant in this behalf [or, if in C. P. or by original, say, "next before the commencement [\*1031] of this suit,"] in manner and form as the said plaintiff hath above there-  
of complained against him the said defendant. And this, &c. [*Conclude with a verification, as ante, 907, sixth form.*]

[*First plea, general issue, as ante, 1030; second plea, actio non, as ante, 906, third form.*]—Because he says, that after the committing of the said grievances as aforesaid, and before the exhibiting of the bill of the said plaintiff against the said defendant in this behalf, [or, if in C. P. or by original, "before the commencement of this suit,"] to wit, on, &c. at, &c. (*venue*) aforesaid, he the said defendant paid to the said plaintiff the sum of £—, of lawful money of Great Britain, for and in full satisfaction and discharge of the said grievances in the said declaration mentioned, and which said sum of £— he the said plaintiff then had there accepted and received of and from the said defendant, in full satisfaction and discharge of the said grievances. And this, &c.— [*Conclude with a verification, as ante, 907, sixth form.*]

Accord  
and satisfac-  
tion (z)

[*First plea, general issue, as ante, 1030; second plea as follows:*]— And for a further plea in this behalf, [*if the plea is intended to justify the words in particular counts only, here say, "as to the speaking and*

Justifica-  
tion of  
words of  
theft, that  
plaintiff  
was guilty  
of theft (a).

(y) As to this plea, see 6 East, 887.—3 B. & A. 448. It seems, that to an action of trover, or on the case for a grievance, the admitting of which immediately gives a plea of action, the plea of not guilty within six years is good, though it may be better to plead to the above form in all cases, being more consonant to the act of parliament. In *Smith v. Swaine*, 24th May, 1828, 8 B. & C. 181. S. C. Bayley, Holroyd, and Littledale, J. J., stated that they considered that the plea of not guilty within six years would be sufficient in the ordinary action of trover. But if the plaintiff declared as administrator, and alleged the conversion after the death, and did not show that the conversion was before letters of administration were obtained, the court held, that, according to 5 B. & A. 204, the plea of not guilty within six years was bad; and it was *non constat*, that the conversion was before

the letters of administration were obtained, in which case the six years would not begin to run till they had been obtained.

(z) See form, 5 East, 294. The subject-matter of this plea may be given in evidence under the general issue in case, but not in trespass, 8 Burr. 1353.—1 Bla. Rep. 888, S. C. It is, however, in general advisable to plead it. If the accord and satisfaction took place after action brought, see the form in trespass, post, 1062; and the form in assumption, Post, Addenda to p. 909.

(a) See the forms and notes, 1 Saund. 244, n. 6.—8 Wentw. Index, xii. to xv. 2 Rich. 63, 168.—Morg. 313 to 320. Plead. A. 112.—Herne, 112.

The necessity for pleading specially in slander, and the mode of framing such pleas, will be found more aptly considered in volume i. of this work, page 528. &c. Where

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[1033]

publishing of the said several words of and concerning the said plaintiff, as in the — counts mentioned (b),”] the said defendant by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, saith that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that the said plaintiff, before the speaking and publishing of the said several words of and concerning the said plaintiff, as in the said [— counts of the said] declaration mentioned, to wit, on, &c. at, &c. (*venue*) did feloniously steal, take, and carry away certain goods and chattels, to wit, — of one E. F. of great value, to wit, of the value, of £— (c). Wherefore he the said defendant afterwards, to wit, at the said several times when, &c. in the [— counts mentioned] at, &c. (*venue*) aforesaid, did speak and publish the said words of and concerning the said plaintiff, as in the [said — counts of the said declaration mentioned, as he lawfully might for the cause aforesaid. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

Justifica-  
tion of  
words of  
perjury,  
that plain-  
tiff was  
guilty of  
perjury (d)

[*First plea, general issue, as ante, 1030; second plea, actio non, as ante, 909, third form.*—Because he says, that before the speaking and publishing the said words of and concerning the said plaintiff, [in the said — counts mentioned] to wit, on, &c. at, &c. (*venue*) at the assizes (e) then and there holden before — then chief justices of our said lord the king, assigned to hold pleas before the king himself, and — then one of the justices of our said lord the king, assigned to hold pleas before the king himself, justices of our said lord the king, appointed to take the assizes for the said county, according to the form of the statute in such case made and provided, a certain issue before then joined in an action brought and prosecuted in the court of our said lord the king, before —, and his companions, then justices of our said lord the king of the bench at Westminster, in the county of Middlesex, by and at the suit of one E. F. as the plaintiff, against one G. H. as the defendant, for the supposed breach of certain promises and undertakings

the defendant justifies the slander, it will in general be found necessary to plead specially, though in some instances the general issue will suffice. It will also be found that general pleading is not allowed in justifying the truth of the slander, and that the plea must point out the facts specifically, though indeed where the charge contained in the slander is specific, the defendant need not further particularize it in his plea, see fully vol. i. Index “*Slander*.” Care should be taken that the plea of justification do not, in its commencement or elsewhere profess to justify any part of the slander which cannot be justified.

It was formerly usual in the plea to repeat the words mentioned in the declaration, but this is no longer the practice, 1 Saund. 244, n. unless the defendant only justifies speaking part of the words in any particular count, in which case the plea may run thus;—“And for a further plea in this behalf, as to the speaking and publishing of the following words in the said — counts mentioned, that is to say, he, &c. (*repeating the words intended to be justified, with the innuendoes*) the

said defendant by leave, &c.”

How to plead where all the counts are on the same libel, see 2 Chit. Rep. 291. From that case it appears, a plea, stating that the libels were one and the same libels, and also justifying it, would be bad on demurrer, for duplicity.

The plaintiff, on the trial, cannot object to the insufficiency of the plea, justifying a libel, 3 Stark. 7.

(b) The plea should be pleaded to those words only which the defendant can justify, *supra*, note.—6 Bing. 266.

(c) If the offence were not one at common law, but only by statute, then frame the plea accordingly, and state that the theft was “against the form of the statute in such case made and provided.”

(d) See forms, 2 Rich. C. P. 123.—*Ant. Ept.* 21.—*Thomp. Ent.* 65.—3 *Inst. Cl.* 224, 237.—8 *Wentw. Index*, xii. to xv.—1 *Taunt.* 643, and the note to the former precedent, and *Com. Dig. Pleader*, 2 L. 3, &c.

(e) Of course the plea must agree with the facts, the form here given is a mere outline

FOR  
STANDER.

alleged by the said E. F. to have been made to him by the said G. H. and not performed, came on to be tried in due form of law, and was then and there tried by a jury of the country in that behalf, duly taken and sworn between the parties aforesaid, and upon such trial of the said issue the said plaintiff appeared as a witness for and on behalf of the said E. F. the plaintiff in the said action, and the said plaintiff was then and there in open court at the said assizes holden as aforesaid, before the said ——— and ——— (f), the justices aforesaid, duly sworn, and took his corporal oath upon the Holy Gospel of God, to speak the truth, the whole truth, and nothing but the truth, touching and concerning the matters in question in the said issue (they the said ——— and ——— then and there having sufficient and competent power and authority to administer the said oath to the said plaintiff in that behalf; and upon the said trial of the said issue, it then and there became and was material to ascertain the truth of the matters hereafter stated to have been sworn to by the said plaintiff. And the said defendant further says, that the said plaintiff being so sworn as aforesaid, upon his oath aforesaid, then and there, to wit, on, &c. aforesaid, at, &c. (venue) aforesaid, falsely, wickedly, wilfully, maliciously, and corruptly, and by his own [1034] act and consent did say, depose, swear, and give evidence, amongst other things, at and upon the said trial, to and before the said jurors so sworn, to try the said issue as aforesaid, and the justices aforesaid, that ——— [Here state that part. of the plaintiff's evidence in which he committed perjury.] Whereas in truth and in fact, &c.—[Here negative the plaintiff's evidence as in an indictment for perjury.]—And the said plaintiff did thereby in the said court at the said assizes so holden as aforesaid, upon his said oath upon the trial of the said issue, falsely, wickedly, wilfully, and corruptly, commit wilful and corrupt perjury; therefore the said defendant, at the said several times, when, &c. in the said ——— counts mentioned, at, &c. (venue) aforesaid, spoke and published of and concerning the said plaintiff, the said several words, in the said ——— counts mentioned to have been spoken and published by the said defendant of and concerning the said plaintiff, as it was lawful for him to do for the cause aforesaid. And this, &c.—[Conclude with a verification, as ante, 906, sixth form.]

[First plea, general issue, as ante, 1030; second plea, *actio non*, as ante, 906.]—Because he says, that the said plaintiff, at the said several times when, &c. in the said ——— counts mentioned, at, &c. (venue) aforesaid, was in bad and indigent circumstances, and incapable of paying his just debts (h), to wit, a certain just debt amounting to a large sum of money, to wit, the sum of £—, which he then and there owed to one E. F., &c.—[Here state generally, the subject-matter of the debt] and a certain other just debt, amounting to a large sum of money, to wit, the sum of £—, which he the said plaintiff then and there owed to one G. H., &c. [enumerating as many debts as can be proved to have been due in arrears]; and which said several debts the said plaintiff was then and there unable to pay. Add this, &c.—[Conclude with a verification, as ante, 907, sixth form.]

Justification of words of insolvency, that plaintiff was insolvent(g).

(f) It is sufficient to say, before the judge Pleader, 2 L. 8.

tried the cause, 1 Leach, 150. 2 Chit. Law, 809, 867.

(g) See the notes, ante, 1031.—Com. Dig.

(h) This must correspond with the words stated in the declaration.

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SLANDER.

Plea, that a third person was the author of the slander which defendant, at the time of his repeating it, stated to the hearers (i).

[*\*First plea, general issue, as ante, 1080; second plea, actio non, as ante, 906, third form.*]—Because he says, that before the speaking and publishing of the said several words in the said — counts mentioned, and therein supposed to have been spoken and published by the said defendant of and concerning the said plaintiff, to wit, on the said several days in the said — counts mentioned, at, &c. (*venue*) aforesaid, one E. F. of No. —, — Street, in the parish of — in the county of — falsely and maliciously spoke and published the following words, to and in the presence and hearing of the said defendant of and concerning the said plaintiff, that is to say, &c. [*Here repeat the words precisely as they were used, with the innuendoes, corresponding with those stated in the declaration, though it will be sufficient to prove some material part of them, 2 East, 426.*] And the said defendant further saith, that at the time of his speaking and publishing the said several words in the said declaration as therein mentioned, he the said defendant believed the same to be true in fact, and being then and there interrogated and asked by the said plaintiff what the said E. F. had so falsely and maliciously spoken and published as aforesaid, he the said defendant then and there answered and declared, in the presence and hearing of the same persons, in whose presence and hearing the said words were so spoken by the said defendant as aforesaid, that he had heard and been told the same from and by the said E. F. of, &c. aforesaid. Wherefore he the said defendant, at the said several times, when, &c. in the said — counts mentioned, did speak and publish of and concerning the said plaintiff the said several words in the said — counts mentioned, as he lawfully might for the cause aforesaid. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

Plea justifying the truth of part of the libel set forth in declaration, charging plaintiff a proctor, with having been suspended three times (k).

And for a further plea in this behalf, the defendant saith, that as to the publishing, and causing and procuring to be published, so much of the said supposed libellous matter as imputes or charges to or against the plaintiff, that he, before the said several times when, &c. had been once suspended in his aforesaid profession and business of a proctor, above supposed to have been done by the said defendant, the said defendant by leave, &c. saith, that the said plaintiff ought not, &c. because he saith, that the said plaintiff, before the said times when, &c. in the said declaration mentioned, to wit, on the 10th of January, in the year last aforesaid, had been employed in the way of his aforesaid profession and business of a proctor, by one T. G. and afterwards, and before the said several times when, &c. to wit, on the day and year last aforesaid, fraudulently and extortionately demanded of and from the said T. G. as and for the sum of money justly due to him the said plaintiff from the said T. G. for the work and labor of him the said plaintiff as such proctor done, performed, and bestowed in and about the business of the said T. G. in pursuance of the last aforesaid employment, and for the fees and disbursements due and made to and by him

(i) As to this plea, and the law and forms, see 7 T. B. 17 to 19.—2 East, 426.—3 B. & C. 24.—2 M. & P. 995.—5 Bingham, 892, S. C.—10 B. & Cres. 263—Ante, vol. i. Index, "*Slander*." It seems very questionable if this plea can be supported.

(k) This was the form adopted in 6 Bingham, Rep. 587. In that case the declaration was

for a libel on plaintiff, a proctor, charging him with having been suspended three times, and the plea, as above, justified the truth, as one of the said suspensions, that the plaintiff had been once suspended by Sir J. N. It was held the libellous matter was thus divisible, and the plea an answer to part.

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SLANDER

as such proctor in respect thereof, a certain large sum of money, to wit, the sum of 19*l.* 14*s.* 4*d.* Whereas in truth and in fact, the sum of money then and there justly due to him the said plaintiff in that behalf, then and there amounted to a much less sum of money, to wit, the sum of 9*l.* 19*s.* 8*d.* And the said defendant further saith, that afterwards, and before the said several times when, &c. to wit, on the 13th day of February, in the year last aforesaid, Sir J. N. knight, then being Judge of the Prerogative Court of Canterbury, caused the aforesaid false, fraudulent, and extortionate demand to be taxed by the proper officers of the said Court in that behalf, to wit, the Rev. G. M., C. M., Esq. and the Rev. R. M., registrars of the said Court; and that the said officers, by their deputy in that behalf, did afterwards, and before the said several times when, &c. to wit, on the 20th day of February in the year last aforesaid, report in the said Court to the said Sir J. N. as and being such Judge as aforesaid, according to the forms and practice of the said Court, that upon such taxation of the aforesaid false, fraudulent, and extortionate demand, a small part thereof, to wit, the sum of 9*l.* 19*s.* 8*d.* only, had been justly found due to the said plaintiff from the said T. G. And the said defendant further saith, that thereupon by reason of the premises, afterwards and before the said several times when, &c. to wit, on the 19th day of March, in the year aforesaid, the said Sir J. N. as and being Judge of the said Court, did order, direct, and adjudge to be suspended, and did suspend the said plaintiff from exercising the business of a proctor of the said Court for and during the space of one year then next following; and did then and there direct, that at the expiration of the space of one year, the said plaintiff should be further suspended until he should appear and publicly make faithful promise to abstain from all mal-practices in the future exercise of his business as a proctor in the said Court. And the said defendant further saith, that the said Sir J. N. in that plea mentioned, and Sir J. N. in the said supposed libels named, are one and the same person; therefore the said defendant afterwards, at the said several times when, &c. did publish, and cause and procure to be published, so much of the said supposed libellous matters in the said declaration mentioned as imputes or charges to or against the said plaintiff, that he the said plaintiff, before the said several times when, &c. had been once suspended in his aforesaid profession and business of a proctor as he the said defendant lawfully might for the cause last aforesaid, which are the same publishing and causing to be published the said supposed libellous matters as are in the introductory part of this plea mentioned, and this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

[*First plea, general issue, as ante, 1080; second plea, as follows:*—That defendant had reasonable cause to suspect that plaintiff had been guilty of opening letters, and that as an attorney for a further plea in this behalf, as to the composing and publishing the said supposed libel, in the said [first] count of the said declaration mentioned, and also as to the speaking and publishing so many of the said supposed words in the [last] count of the said declaration mentioned, as impute to the said plaintiff the unlawful opening of letters received by him, as such deputy post-master as aforesaid, before the delivery thereof to the persons to whom the same were directed, or for their uses, the said defendant by leave, &c. [*actio non.*].—Because he saith, that before the composing and publishing of the said supposed libel, and also before the

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ney he had  
been em-  
ployed to  
prosecute  
him, on a  
penal stat-  
ute, and  
that the  
letters writ-  
ten, and  
the words  
spoken,  
were writ-  
ten and  
spoken by  
persons  
employed  
in superior  
stations in  
the post-  
office to  
defendant,  
by way of  
complaint.

[\*1086]

speaking and publishing of the said supposed words in the introductory part of this plea mentioned, and whilst the said plaintiff was thus deputy post-master, as in the said declaration mentioned, to wit, on, &c. at, &c. (*venue*) as well a certain letter directed to one G. A. (by the name and description of Mr. A. Billericay, as certain other letters, had been severally delivered into the post-office there; and \*that after such delivery of the said letters respectively into the said post-office, and before they were delivered to the said persons to whom the same were directed, or to their use respectively, and also before the composing and publishing of such supposed libel, or the speaking and publishing of such words as aforesaid, to wit, on, &c. last aforesaid, at, &c. (*venue*) aforesaid, the said letters had been unlawfully opened, contrary to the form of the Statute in such case made and provided; and the said defendant further says, that he, before and at the said times, when, &c. in the first and last counts mentioned, to wit, on the day and year therein specified, at, &c. aforesaid, had reasonable and probable cause to suspect (1), and did then and there actually suspect that the said plaintiff, whilst such deputy post-master as aforesaid, had unlawfully opened the said letters, and had been in the habit of opening letters delivered into the said post-office, at, &c. aforesaid, as in those counts mentioned, and that the said supposed libel was directed and sent by the said defendant to the said B. I. B. in the said declaration mentioned, and the said words were spoken and published by the said defendant to the persons who, as well the said B. I. B. at the said times when, &c. in the said first and last counts mentioned, were severally employed in and relating to the post-office, in stations, superior to that of the said plaintiff, as such deputy post-master, and were respectively published to them by way of complaint against the said plaintiff; the said B. I. B. and the said other persons then and there being parties to whom the complaint, on the occasion aforesaid, might be fitly and properly made, to wit, at, &c. (*venue*) aforesaid; and the said defendant further says, that before the time of the composing and publishing of the said supposed libel, to wit, on, &c. he the said defendant being such attorney as aforesaid, had commenced an action at the suit of one T. D. against the said plaintiff in his majesty's court, before the king himself, then and still being holden at Westminster aforesaid, upon a statute made and passed in the 9th year of the reign of Queen Anne, for the recovery of several penalties which were alleged to have been incurred by the said plaintiff by reason of his opening, and causing and procuring, and permitting and suffering to be opened, the aforesaid letters directed to the said G. A. contrary to the form of the same statute which are the same composing and publishing of the said supposed libel, and the speaking and publishing of the said words in the introductory part of this plea mentioned, and whereof the said plaintiff hath, in and by his said first and third counts in that behalf complained against him the said defendant, and this, &c. wherefore, &c.

[ 1037 ]

Plea to an  
action for a  
libel, that

[*First plea, general issue, as ante, 1030; second plea, actio non, as ante, 906, third form.*]—Because he saith, that before and at the time of

(1) The ground of suspicion must be shown, 4 Taunt. 30

the said supposed grievances, to wit, at, &c. (*venue*) the said defendant was colonel and commanding officer of the said regiment in the said declaration mentioned, called, &c. and being such colonel and commanding officer of the said plaintiff, the said plaintiff, being, as averred in the said declaration, captain, lieutenant, and paymaster of the said regiment, the said several charges stated and alluded to in the said declaration, as contained in the supposed libel in the said declaration mentioned, were charges and accusations made and exhibited to him the said defendant as such commanding officer of the said regiment as aforesaid, by the lieutenant and acting adjutant in the said regiment, E. F. in the said declaration also mentioned, officially, and in order that the said defendant might also officially, and as in duty bound, as such colonel and commanding officer of the said regiment, transfer the said charges to the then commander in chief, the honorable general G. H. and which said charges the said defendant did accordingly transfer to the said commander in chief, in order that the said plaintiff might be brought to a court martial for the said alleged offences in the said charges contained, as it was lawful for the said defendant to do for the cause aforesaid, which is the same publishing, &c. and this, &c. wherefore, &c.

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defendant as commanding officer, sent the letter to the commander in chief, in order that plaintiff might be brought to a court martial (m).

[*First plea, general issue, as ante, 1080; and for a further plea in his behalf, the said defendant; by leave, &c. says, actio non.*]—Because he saith, that the said defendant, before the committing of the said several supposed grievances in the said declaration mentioned, or any of them, to wit, on, &c. did exhibit his English bill of complaint in \*writing in the court of our lord the king, of his Exchequer, at Westminster, in the county of Middlesex, against the said plaintiff, directed to the right honorable ——— chancellor, and under treasurer of his said majesty's court of Exchequer at Westminster, the right honorable Sir W. A. knight, lord chief baron of the same court, and the rest of the barons there, alleging that he had from time to time accommodated the said plaintiff with divers loans, bills of exchange, and drafts in the said bill mentioned, and praying, (amongst other things) for a discovery, and that an account might be taken of the several transactions, drafts, or bills of exchange, matters and things in the said bill of complaint mentioned, and of divers acts between the said defendant and the said plaintiff, and that the said plaintiff might, in the mean time, be restrained by the injunction of the said court of Exchequer, from suing out any execution in a certain action at law, before then commenced by the said plaintiff against the said defendant, in the court of our said lord the king, before the king himself at Westminster, in a certain plea of trespass in the said bill, in the said bill of complaint more particularly mentioned, as in and by the said bill of complaint of the said defendant, remaining duly affiled in the said court of exchequer at Westminster aforesaid, in the said county of Middlesex, more fully appears; and the said defendant further saith, that the said plaintiff afterwards, to wit, on, &c. aforesaid, at Westminster aforesaid, in the said county of Middlesex, came before Sir B. G. knight, one of the barons of his majesty's court of Exchequer, at West-

Plea (to declaration for libel, accusing plaintiff of perjury,) that plaintiff did perjure himself in his answer (n).

[\*1038]

(m) This plea is sustainable, see *Johnson v. Esp. Rep. 63.*  
*Stanton*, 1 T. R. 493; but see 4 Taunt 67. 6 (n) See form, ante, 1083.

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SLANDER.

[ 1039 ]

minster, and then and there, before the said Sir B. G. exhibited and produced the answer in writing of him the said plaintiff, and was then and there in due form of law, sworn upon the Holy Gospel of God, before the said Sir B. G. then and there being one of the barons of the said court of Exchequer at Westminster aforesaid, and then and there having sufficient and competent power and authority to administer an oath to the said plaintiff in that behalf, touching and concerning the said matters and things contained in the said answer; and that the said plaintiff, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, and minding and intending unjustly to aggrieve the said defendant, did then and there, at Westminster aforesaid, upon his oath aforesaid, in his answer aforesaid, before the said Sir B. G., then and there being such baron, and then and there having "such sufficient and competent power and authority as aforesaid, knowingly, falsely, wickedly, maliciously, wilfully, and corruptly, by his own act and consent, did, (amongst other things,) answer, swear, and affirm, in writing, in substance and to the effect following, to wit, &c. [*set out the answer fully, with the necessary innuendoes*] as by the said answer of the said plaintiff remaining duly filed in the said court of Exchequer at Westminster aforesaid, in the said county of Middlesex, more fully appears; whereas in truth and in fact the said plaintiff had been and was, &c. (*denying and contradicting all the positions in the answer, as in the bill is mentioned*), to wit, at Westminster aforesaid, in the county aforesaid; and the said plaintiff, when he so deposed and swore to the truth of the said answer as aforesaid, then and there, to wit, at Westminster aforesaid, in the said county of Middlesex, well knew the said several matters and things aforesaid, so sworn by him as aforesaid, to be false and untrue; and whereas in truth and fact the said defendant did give, &c. (*denying the answer, as in the said answer is alleged*), and the said plaintiff, when he so deposed and swore in that behalf as aforesaid, then and there, to wit, at Westminster aforesaid, well knew and believed that the said bill was given as a loan or accommodation to him as aforesaid; and whereas in truth and in fact the said plaintiff did, &c. (*denying answer, and asserting that plaintiff perjured himself throughout all the positions of the answer*;) and the said defendant further says, that on the occasion of the said plaintiff so swearing and deposing as aforesaid, it became and was material, for the purposes of the said suit, to ascertain the truth of the matter so by him sworn and deposed to as aforesaid; and the said defendant says, that the said plaintiff, on, &c. at, &c. (*venue*) aforesaid, before the said Sir B. G. (then and there being one of the barons of the said court of Exchequer at Westminster, and then and there having competent power and authority to administer the said oath to the said plaintiff,) did knowingly, falsely, wickedly, maliciously, wilfully, and corruptly, in manner and form aforesaid, commit wilful and corrupt perjury, to the great displeasure of Almighty God, to the great damage of him the said defendant, to the evil example of others, and against the peace of our said lord the king, his crown and dignity; wherefore the said defendant, at the said several times when, &c. the same and every of them being after the commission of the said perjury by the said plaintiff as aforesaid, "published the said supposed libel, and spoke and

[\*1040]



published the said several words in the said declaration mentioned, as it was lawful for him to do, for the cause last aforesaid, was this, that the said defendant doth aver that the said bill and answer hereinbefore mentioned are respectively one and the same bill and answer, and not other and different, and which said answer was sworn to before the said Sir B. G. in manner aforesaid, and not at, Chepstow aforesaid, or elsewhere, of the county of Middlesex, as aforesaid. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

FOR  
SLANDER.

[*First plea, general issue, not guilty, as ante, 1030.*].—And for a further plea in this behalf, as to the speaking and publishing the words following, parcel of the words in the said first count of the said declaration mentioned, to wit, “I saw the ship, and the splice or scuff of the keelson was open, so that I could put my four fingers in edgeways;” and also as to the speaking the words in the said second count of the said declaration mentioned, to wit, “the ship’s back is broke,” and also as to speaking and publishing the said words in the third count of the said declaration mentioned, he the said defendant, by leave, &c. (*actio non*) because he says, that before the time when the said words were by him spoken as aforesaid, he the said defendant had seen the said ship, and the splice or scuff of the keelson of the said ship was open, so that he the said defendant could put his four fingers in edgeways, and that the said ship’s back was broke, to wit, at, &c. (*venue*) aforesaid, by reason thereof the said defendant at the time in the said declaration mentioned, spoke and published the said words in the introductory part of this plea mentioned, as it was lawful for him to do. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

Plea to declaration to slander of plaintiff’s ship, that defendant had seen the splice or scuff was open, so that he could put in his fingers.

[*First plea, not guilty, as ante, 1030; second plea, actio non, as ante, 906, third form.*].—Because he says, that the “diocese of Chester is, and at the time of the death of the said L. was within the province of York, and that the said diocese of Carlisle is, and at the time of the death of the said L. and at the time of the granting of the said letters of administration was within the province of York, and that the said L. at the time of his death, was an inhabitant of, and commorant at the parish of K. in the county of Westmoreland, and within the diocese of the bishop of Carlisle; and the said defendant further says, that the said L. in his life-time, and at the time of his death, had divers goods and chattels, rights, and credits, which were *bona notabilia* in the several dioceses of the bishop of Carlisle, and of the bishop of Chester, within the said province of York, that is to say, goods and chattels to the value of £— and upwards, within the said diocese of the bishop of Carlisle, to wit, at the parish of K. and also other goods and chattels to the value of £— and upwards, within the said diocese of the bishop of Chester, to wit, at and in the said county of Westmoreland; by reason whereof the said letters of administration are void,

AT THE  
SUIT OF  
EXECUTORS.

[“1041”]

Plea (to a declaration in trover, at suit of administrator, where administration was granted by bishop of C.) that intestate had *bona notabilia* in divers dioceses, and so the administration void, because it should have been granted by archbishop (o).

(o) See other pleas, by or against executor, ante, 941. As to the plea of *bona notabilia* in general, see 1 Saund. 274, n. 3.—See Ab. Executors.

If the defendant says that the administration was void, because he did not reside within the diocese at the time of intestate’s death, he should plead it specially, 5 B. & C. 493.

If the other diocese, in which the intestate had *bona notabilia* was in a different province, the diocesan has power to grant administration; but where an intestate has *bona notabilia* in two dioceses, within the same province neither diocesan has any power to grant such administration, but it must be done by the metropolitan of the province, 5 B. & C. 493 — 8 D. & R. 247, S. C.

and of no effect in law, and this he the said defendant is ready to verify; wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

[\*1042]

## \*IN REPLEVIN\*

IN  
GENERAL.  
Non cepit  
(a).

*In the King's Bench, (or "C. P." or "Exchequer.")*

C. D. } *Term, — Will. 4.*  
ats. } And the said defendant by E. F. his attorney, comes and de-  
A. B. } fends the wrong and injury, when, and, &c. and says, that he did  
not take the said [cattle, goods, and chattels,] in the said declaration  
mentioned, or any or either of them, or any part thereof, in manner and  
form as the said plaintiff hath above thereof complained against him,  
And of this the said defendant puts himself upon the country, &c.

1st. Com-  
mence-  
ment of an  
avowry  
(b).

*In the King's Bench, (or "C. P. or Exchequer.")*

C. D. } *Term, — Will. 4.*  
ats. } And the said defendant by E. F. his attorney, comes and de-  
A. B. } fends the wrong and injury, when, &c. and well avows the taking  
of the said [goods and chattels (c)] in the said declaration mentioned,  
the said [dwelling-house (d)], in which, &c. and justly, &c. because he  
says that, &c.—[*Here follows the subject-matter of the avowry.*]

2dly. Com-  
mence-  
ment of a  
cognizance  
(e).

[\*1043]

C. D. }  
ats. } And the said defendant by E. F. his attorney, comes and de-  
A. B. } fends the wrong and injury, when, &c. and, as the bailiff of G.  
H. well acknowledges the taking of the [goods and chattels (f)] in the  
said declaration mentioned, in the said [dwelling-house (g)], in which  
&c. and justly, &c. because he says, that, &c.—[*Here follows the subject-  
matter of the cognizance.*]

\* As to avowries in general, see vol. i. Index "Replevin."

(a) When the defendant had not in fact taken the goods or cattle, as in the case of a pound-keeper, who has merely received them into the pound, Cowp. 476, or where the place of taking the cattle is mistaken, and the defendant never had the cattle in the place named in the declaration, this plea is sufficient and the plaintiff will be nonsuited thereon. 1 Saund. 847, note 1. But the defendant cannot have a return of the goods under this plea, and therefore, in order to have a return, he must plead that he took the goods in some other place, describing it, and traverse the place laid in the declaration, and in order to have a return, avow or make cognizance, stating the cause for which he distrained, 1 Saund. 847, note 1. See the forms, post 1045.

(b) As to an avowry in general, see ante, vol. i. Index, "Replevin."—Com. Dig. Pleader, 8 K. 18, 14, 15, 17, &c. and 1 Saund. 847, &c.

(c) If the declaration mentions the taking to have been of other things, as cattle, &c. then let this agree therewith.

(d) If the declaration mentions any other thing, let this agree therewith.

(e) The term "cognizance," imports justification of the taking in right of another. The words "as bailiff of, &c." are material, and if one avow and other made cognizance without saying as bailiff of the avowment, an entire damages be given, it is said it will error, Yelv. 108.—Com. Dig. Pleader, 2 K. 1. The words "as bailiff of E. F." without showing the defendant's authority, are sufficient in all cases, 1 Saund. 847, note 4, and if the defendant says, "well avows," instead of "well acknowledges," it is sufficient, though technically correct, Cro. Jac. 373. In replevin the acting as bailiff may be traversed, 1 Saund. 847, c. n. 4.

(f) Let this agree with the things mentioned in the declaration.

(g) Let this agree with the premise stated

C. D. &amp; E. F. }

ats.

A. B. }

And the said C. D. and E. F. by G. H. their attorney, come and defend the wrong and injury, when, &c. and the said C. D. in his own right well avows, and the said E. F. as bailiff of the said C. D. well acknowledges the taking of the said [goods and chattels (f)] in the said declaration mentioned, in the said [dwelling-house (g)] in which, &c. and justly, &c. because they say that, &c.—  
*[Here follows the subject-matter of the avowry and cognizance.]*

IN  
GENERAL.  
8dly. Commencement of an avowry by one, and of a cognizance by another.

And by leave of the court here, for this purpose first had and obtained, according to the form of the Statute in such case made and provided, the said C. D. further in his own right well avows, and the said E. F. as bailiff of the said — further well acknowledges the taking of the said [cattle, goods, and chattels,] in the said declaration mentioned, in the said [dwelling-house and farm] in which, &c. and justly, &c. because, &c.

4thly. Commencement of a second avowry or cognizance (h).

And this <sup>then</sup> the said defendant <sup>s are</sup> is ready to verify; wherefore <sup>th</sup> he prays judgment and a return of the said [goods and chattels] together with his damages, &c. (k), according to the form of the Statute in such case made and provided, to be adjudged to him, &c. <sup>then</sup>

5thly. Conclusion of an avowry or cognizance (i).

[\*1044]

[*Actio non, as ante, 906, first form.*]—Because he saith, that the said [goods and chattels] in the said declaration mentioned, at the said time when, &c. were the property of the said defendant (or, “of one E. F.”) and not of the said plaintiff, as by the said declaration is above supposed. And this he the said defendant is ready to verify; wherefore he prays judgment, if the said plaintiff ought to have or maintain his aforesaid action thereof against him, and he also prays return of the said [goods and chattels] together with his costs in this behalf, according to the form of the Statute in such case made and provided, to be adjudged to him; &c.

Plea in bar property in defendant or a stranger (i).

And the said defendant, by — his attorney, comes and defends the wrong and injury, when, &c. and says, that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he saith that the said cattle, goods, and chattels, at the said time when, &c. were the property of one C. J. and not of the said plaintiff, as by the said declaration is above supposed; and this he the said defendant is ready to verify; wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, he also prays a return of the said cattle, goods, and chattels, together with his costs, in this behalf, according to the form of the Statute in such case made and provided, to be adjudged to him, &c.

The like in another form.

[\*1045]

(f) & (g) see ante, preceding notes.

(h) See another form, *Boote's Suit at Law*,

See form, *Morg. 591*. It is usual to make an avowry, or cognizance, with a declaration, see precedents, 1 *Saund. 347*.—*ibid.* 230, 240. But these being in the case of a declaration need not be averred, *ibid.* 308. a.—*Plowd. 145, 163*, and it is to be the best way to conclude each, after stating the cause of the caption, without any argument or further conclusion, 1 *Saund. 347*. See stat. 7 Hen. 8. c. 4, s. 8, and 21 Hen. 8. c.

19, s. 8, in case any avowry or cognizance for rent, &c. or for damage feasant, be found for the defendant, or if the plaintiff be nonsuit or otherwise barred, enact, that defendant recover his damages and costs, the conclusion of the avowry therefore alludes to these statutes.

(k) See the former note; the “&c.” means “costs and charges by him about his defence in this behalf expended.” 1 *Saund. 347*.

(i) As to the mode of pleading property, see *Bul. N. P. 54*.—*Lil. Ent. 358*.—2 *Rich. C. P. 7*.

IN  
GENERAL  
Cepit in  
alio loco  
with a-  
vowry for  
return(m).

C. D. )

ats. } [Actio non, (n) as ante, 906, first form.]—Because he saith, A. B. ) that he took the said cattle in the said declaration mentioned, in a certain close called the — in the parish of — aforesaid, in the county aforesaid, without this, that he took the said cattle, or any or either of them, in the said place called the — in the said parish of — in the county aforesaid, as the said plaintiff hath in his said declaration in that behalf alleged. And this he the said defendant is ready to verify; wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c. And for having a return of the said cattle, the said defendant well avows the taking of the said cattle, in the said declaration mentioned, in the said close called — (o) and justly, &c. Because he saith, that (p) before the said time when, &c. and at the time of the making the demise hereinafter mentioned, one E. F. was seised of and in the said close called the — in which, &c. with the appurtenances, in his demesne as of fee, to wit, in the parish aforesaid; and being so seized, he the said E. F. before the said time when, &c. to wit, on, &c. A. D. — aforesaid, in the parish aforesaid, in the county aforesaid, demised the said close called —, in which, &c. with the appurtenances, among other things, to the said defendant, to have and to hold the same to the said defendant for the term of — years thence next ensuing, and fully to be complete and ended: by virtue of which said demise, he the said defendant afterwards, and before the said time when, &c. to wit, on the day and year last aforesaid, entered into the said close called the —, in which, &c. with the appurtenances, and became, and until and at the said time when, &c. was lawfully possessed thereof; and because the said cattle in the said declaration mentioned, at the said time when, &c. were wrongfully and injuriously in the said close called —, and treading down and depasturing the grass and herbage there then growing, and doing damage there to the said defendant, he the said defendant well avows the taking of the said cattle, in the said close called — and justly, &c. as for and in the name of a distress, for the said damage so there done and doing as aforesaid (q)

Plea admitting that defendant had the cattle in locus in quo but took them damage feasant in another close (r).

C. D. )

ats. } And the said defendant by E. F. his attorney, comes and defends the wrong and injury, when, &c. and well avows the taking and having the said [mare] in the said declaration mentioned, in the said piece or parcel of land called —, as in the said declaration mentioned, and justly, &c. because he says, that, &c.—[Here state a seisin in

(m) See the note to the plea of *non cepit*, ante, 1042, n. a, and the precedents, Willes, 475.—Rast. Ent. 554, 555.—Clift. Ent. 686.—Tidd's Forms, 598; 4th ed. 690. The avowry being only in the nature of a suggestion to entitle the defendant to a return of the cattle, &c. the plaintiff cannot traverse it, but must either take issue on the traverse of the place, or amend his declaration, 1 Saund. 347, note 1.—Willes, 475.—2 B. & P. 482.

(n) In the forms referred to in the last note the defendant prayed judgment of the declaration, but as this plea is in bar, and not in abatement, 'actio non' seems more proper, 1 Saund. 347, note 1.—Barnes, 353.—Willes, 475.

(o) The close first mentioned in the avowry.

(p) The avowry or cognizance is to be according to the fact, and may be for rent, &c. as in the forms, post, 1047, &c. See Willes, 475.

(q) This conclusion, without a verification, is proper, 1 Saund. 347, n. 7—ante, 1042, n. a.

(r) See the notes to the plea of *non cepit*, ante, 1042; and *cepit in alio loco*, ante, 1045. If the defendant have had the cattle in the place mentioned in the declaration though he took them for rent or damage feasant in another close, he cannot plead *non cepit* or *cepit in alio loco*, but must plead as above, and see the forms, 1 Saund. 347, a.—2 B. & P. 480.—3 Wils. 295.—2 Wils. 854.

of another close in G. H., and a demise thereof to the defendant and his entry, and the distress damage feasant, as in the last form, to the end, and then proceed as follows.]—And the said defendant afterwards, and immediately before the time when, &c. took and led the said [mare] from the said close, piece, or parcel of ground so demised to him as aforesaid, to the said place in the said declaration mentioned, called the —, in which, &c. and at the said time when, &c. had the same there in the way from the said close, piece, or parcel of ground so demised as aforesaid, to a certain open pound in the parish of —, in the county aforesaid, there to be impounded for the damage so done in the said close, piece, or parcel of ground so demised as aforesaid. And this, &c.—[Conclude with a verification, as ante, 1043.]

IN  
GENERAL

[Commencement of avowry or cognizance, as ante, 1042, 8.]—Be- [\*1047] ○  
cause he says, [that the said plaintiff (or "~~one J. K.~~" (c)) for a long time, to wit, for the space of — years (t) next before and ending on a certain day, to wit, the — day of — A. D. — and from thence until and at the said time when, &c. (w) held and enjoyed the said dwelling house(x)

FOR  
RENT, &C.  
Common  
avowry of  
cognizance  
for rent on  
11 Geo. 2.  
c. 19, s. 22  
(u).

(s) See 8 East, 316.—Supra, note.

(t) This is usually the time during which the rent distrained for was accruing due. The precise length of time is not material, provided the rent was due, and the tenancy subsisted at the time of distraining, 6 East, 434.

(u) See forms, Morg. 591.—Tidd's Forms, s. 22 See 1 Chit. Col. St. 176.—2 Saund. c. n. 3.—Gillb. Rep. 175 to 185. The

above form will not suffice if the avowant be entitled to part only of the yearly rent, as if he be a tenant in common only, 6 Bingh. 104. A form of avowry by a tenant in common, ante, 1046. In the case in 6 Bingh. 104, the avowry was for rent due from the plaintiff, as tenant of premises to the avowment, under a demise before then made, at the yearly rent of £10; it was held not supported by proof of a licence to avowant, to which three trustees, the lessors, were parties, but which was executed by only two of them; and see the case there cited.

The above avowry or cognizance admits the property of the goods in the plaintiff, 2 East 72; but if the plaintiff's plea in bar subsequently shows the property of the goods to be in another, the plaintiff cannot maintain the action, id.

How to make cognizance on behalf of a corporation, see 8 Wentw. 102; and by husband and wife, 2 Taunt. 180. A husband may sue in his own name for rent due in right of his wife, 2 Bingh. 71. Cro. Jac. 442, 282.—1 Salk. 273.—8 Salk. 207.

It is sometimes advisable to draw the avowry in common law, setting out the title, in order that a traverse of a particular part of it may be taken, and that the parties may proceed to trial upon some particular point in it, 2 Saund. 284 d.

Who the defendant who succeeds on the avowry

or cognizance for rent is entitled to double costs, without certificate or suggestion, 1 Taunt. 210.—4 B. & C. 889. 2 Bingh. 341.

If the premises have been in possession of an assignee of the lease, yet if the lessor has not assented to the assignment, it is said the avowry may state that the premises were held by the original lessee, 8 East, 316. It seems, however, advisable in such a case to insert two avowries, one on the holding of the lessee, and the other of the assignee.

The 11 Geo. 1. c. 19, s. 22. does not extend to an avowry for a rent charge, 1 New Reports, 58.

Heriot service is within the statute, and lord may avow generally. Heriot custom is not, 2 Saund. 168 a.—2 Wils. 28. The avowry in the latter case must therefore allege seisin of the lord, &c. Co. Ent. 613 a.

That a party may distrain for one rent, and avow for another, see 2 Bingh. 446, and cases there collected.

(w) This is material; if the distress was made within six months after the expiration of the tenancy, under the 8 Ann. c. 14, the avowry must be framed accordingly, as in the form, post, 1051. To entitle a party to distrain, he must have a reversionary interest in the premises at the time of the distress, 5 Bingh. 24.—3 Bla. Com. 7, notes.

(x) State the premises as in the declaration. If other premises be demised besides the locus in quo, then say, "the said dwelling-house amongst other premises," but this is not absolutely requisite, as each part of the premises is liable to the whole rent, 6 B. & C. 84. The avowry also need not state more than what the rent issues out of, and therefore where furniture was also demised with a house, it was held not necessary to mention the furniture, Id. 251. It seems that though the avowry state a holding of more premises than in fact the tenant did hold, this will not be a fatal

FOR  
RENT, &c.

[\*1048]

in which, &c. with the appurtenances, as tenants thereof to the said defendant (or, "~~G. H.~~") by virtue of a certain demise (y) thereof to the said plaintiff (z) (or, "~~the said J. K.~~"), theretofore made, at and under a certain yearly rent, to wit; the yearly rent of £—, payable quarterly, on, &c. (*stating the days of payment*) (a) in every year, by even and equal portions, \*and because (b) the sum of £— (c) of the rent aforesaid, for the space of — (d), ending as aforesaid, on the said — day of —, in the year aforesaid, and from thence until, and at the said time when, &c. (e) was due and in arrear from the said plaintiff to the said defendant (or "~~G. H. in a cognizance~~"), he the said defendant well avows (or, if a cognizance, "~~as bailiff of the said G. H.~~ well acknowledges") the taking of the said goods and chattels (f) in the said dwelling-house (g), in which, &c. and justly; &c. as for (h) and in the name of a distress for the said rent so due and in arrear to the said defendant (or "~~G. H.~~") as aforesaid, and which still remains due and unpaid (i). And this, &c.—[*Conclude with a verification, as ante, 1043.*]

The like  
in a more  
general  
form (k).

[*Commencement of avowry or cognizance, as ante, 1042, 3.*]—Because he says, that he the said defendant, for a long time, to wit, for all the time during which the rent hereinafter mentioned was accruing due, and from thence until, and at the said time when, &c. was landlord to the said plaintiff of the said dwelling-house, in which, &c. and that the said plaintiff for a long time, to wit, for the space of [half a year,] ending on, &c. and from thence until, and at the said time when, &c. held and enjoyed the said dwelling-house, in which, &c. with the appurtenances, as tenant thereof to the said defendant under a certain demise thereof, theretofore made, at and under, &c.—[*As in the preceding form to the end.*]

Avowry  
where part  
of the rent  
has been  
satisfied  
(l).

[\*1049]

[*Same as the form, ante, 1047, 8, to the asterisk, and then proceed thus:*]—And because a large sum of money, to wit, \*the sum of £—, parcel of the sum of £—, of the rent aforesaid, for the space of —,

variance. Therefore where the avowry was for rent in arrear of a dwelling-house, with the appurtenances, and it appeared in evidence that the plaintiff merely occupied the upper part of the house, and that the shop and yard were in the occupation of other tenants, it was held no variance; 10 Moore, 284.

(y) The particulars of the demise need not be stated, but if stated must be proved as alleged, Dougl. 665.

(z) If it be at all doubtful to whom the original letting was, the words "to him the said plaintiff" should be omitted.

(a) The terms of the tenancy, as to the amount of the reserved rent and times of payment, must be accurately described, for a variance would be fatal, 4 Taunt. 820.—2 B. & A. 548. If there be any doubt as to the amount of reserved rent, or the times when payable, other avowries should be added. *Quære*, whether an avowry stating the plaintiff to have held under a demise, at the yearly rent of —l, without stating when the rent was payable, does not infer that the rent was payable yearly, 2 Chit. Rep. 531.—Latch. 264.—Bradbry, 26 n

(b) See the use of this word, Carth. 828, 829.

(c) It is not material to prove the precise sum to be due, as stated in the avowry, and if the defendant avow for two years and a quarter rent, he will recover, if he prove that two years were due at the time of making the distress, 6 East, 484.—5 T. R. 248.—3 B. & P. 848.—2 B. & A. 249.—4 B. & C. 988.

(d) The time during which the rent distrained for was accruing due.

(e) This is material, ante, 1047, a., n. w.

(f) If cattle or other things be alleged in the declaration to have been taken, then avow the taking of them also.

(g) If the taking be alleged in the declaration to have been in any other place than a dwelling-house, then let this avow the taking in such place.

(h) Not necessary after the "because, &c." Carth. 828, 9.

(i) It has been supposed that the words of the stat. 11 G. 2. c. 19. s. 52, render this allegation necessary, but see 2 Marsh. 886, 7.—7 Taunt. 72, S. C.—Gilb. Rep. 181.

(k) Observe the notes to the preceding form.

(l) See form, Tidd's forms, 677. This form is not strictly necessary, for the plaintiff may avow for an entire year's rent, &c. though only part thereof be due, 3 B. & P.

ending as aforesaid, on the said — day of —, in the year aforesaid, and from thence until, and at the said time when, &c. was due and in arrear from the said plaintiff to said defendant (the residue of the said sum of £—, of the rent aforesaid, having been before then paid and satisfied,) he the said defendant well avows the taking of the said goods and chattels in the said declaration mentioned, in the said dwelling-house, in which, &c. and justly, &c. as for and in the name of a distress, for the said sum of £—, parcel, &c. so due and in arrear as aforesaid, and which said sum of £—, parcel, &c. still remains due and in arrear to the said defendant as aforesaid. And this, &c.—[*Conclude with a verification, as ante, 1043.*]

O. D. )

Ans. } And the said defendant comes, &c. and justly, &c. because he says, that the said plaintiff, for a long space of time, to wit, for the space of [one year and three quarters of a year] next before, and ending on, &c. and from thence until and at the said time when, &c. held and enjoyed the said [messuage or dwelling-house,] in which, &c. with the appurtenances, as tenant thereof to the said E. F. by virtue of a certain demise thereof to the said plaintiff theretofore made, at and under the yearly rent of £— payable quarterly, to wit, on, &c. [*stating the days of payment*] in every year, by even and equal portions, and because £— part of the rent aforesaid, for the said space of [one year and three quarters,] ending as aforesaid, (the residue of the said rent being paid and satisfied) on, &c. and from thence until and at the said time when, &c. were due and in arrear from the said plaintiff to the said E. F. the said defendant, as bailiff of the said E. F. acknowledges the taking of the said goods and chattels in the said [messuage or dwelling-house] in which, &c. and justly, &c. as for and in the name of a distress for the said rent so due and in arrear as aforesaid, and which said rent still remains due and in arrear to the said E. F. and this, &c. [The like in another form, being a cognizance. \*1050]

That although at the said time when, &c. £— of the rent aforesaid, being part of one year's rent due on the said — day, &c. aforesaid, were paid to the said plaintiff, yet £— of the said sum aforesaid, being the residue of the year's rent due on the said — were on that said day, &c. in arrear, &c. unpaid, &c. &c. [The like in another form]

[*Commencement as ante, 1042.*—Because he says, that the said dwelling-house in which, &c. in the said declaration mentioned, is, and at the said time when, &c. and for ten years then last past, and long before, was parcel of a certain ancient tenement in the parish aforesaid, called Jarde, otherwise Yardplace, then in the holding of the said J. C. and that the said tenement whereof, &c. with the appurtenances, on the feast day of St. Michael the Archangel, in the year of our Lord — and for the space of four years then last past, and more, and also at the said time when, &c. was and still is held by the said J. C. of the said F. H. as of his manor of Glysthydon, with the appurtenances, in the said county, by and under

148—5 T. R. 248, n. c.—1 Saund. 201, n. 1 ; 28, n. 8—6 East, 437. Com. Dig. Pleader, 2 K. 14; but it is better to avow only for the rent which is really due, in order to avoid the expense which may otherwise be occasioned by the defendant's pleading *rien en arrear*, &c. as to that part of the rent which has been satisfied. (m) See 5 Wentw. 150.

FOR  
RENT. &c.

the yearly rent of four shillings, amongst other things, payable yearly on the feast day of St. Michael the Archangel, of which said manor the said F. H. during all the time aforesaid, and long before, was and ever since hath been, and still is seised in his demesne as of fee. And that the said J. C. before the rent next hereinafter mentioned, or any part thereof, became due, entered into the said tenement, whereof, &c. with the appurtenances, and was seised thereof in his demesne as of fee. And because sixteen shillings of the rent aforesaid, for four years, ending on the feast day of St. Michael the Archangel, in the year of our Lord — on that feast in that year, and also at the said time when, &c. were due, in arrear, and unpaid to the said F. H. he the said T. as bailiff of the said F. H. well acknowledges the taking of the said goods and chattels in the said dwelling-house, in which, &c. so being part of the said tenement, with the appurtenances, in form aforesaid, and justly, &c. as a distress for the aforesaid rent, so being due, in arrear, and unpaid to the said F. H. according to the form of the Statute in such case made and provided, and the said rent still remains wholly due, in arrear, and unpaid: and this the said T. is ready to verify; wherefore he prays judgment, and a return of the said goods and chattels, together with his damages, costs, and charges in this behalf, according to the form of the Statute in such case made and provided, to be adjudged to him.

[\*1051]

Cognizance where the rent was at so much per acre, and quantity not ascertained (u).

\*[*Commencement of a common avowry or cognizance, as ante, 1042* 8.]—Because he says, that the said plaintiff, before the said time when &c. to wit, on, &c. and for a long space of time, to wit, for the space of two years and three quarters of a year then last past, and continually from thence until and at the said time when, &c. held and enjoyed a certain yearly rent, to wit, &c. and also the further yearly rent, after the rate of — shillings per acre for each of the said acres of land, payable quarterly, to wit, on, &c. [*stating the quarter-days*] in each and every year, in even and equal portions, and the said defendant avers, that the said acres of land so held and enjoyed by the said plaintiff as last aforesaid, during the time last aforesaid, amounted to divers, to wit, 118 acres of land, to wit, at the parish aforesaid, and because a large sum of money, to wit, the sum of £— of the rent last aforesaid, for two years and three quarters of a year ending on, &c. as aforesaid, became, and was due, and thenceforth until and at the same time when, &c. was in arrear and unpaid to the said E. F. the said defendant, as bailiff of the said E. F. well acknowledges the taking the said goods and chattels in the said places, in which, &c. and justly, &c. &c.

Avowry for rent when the goods were distrained within six months af-

C. D. }  
ats. } And the said defendant by his attorney, — comes and defends the wrong and injury, when, &c. and well avows the taking of the said [goods and chattels] in the said declaration mentioned, in the

(u) See Vin. Ab. Distress, E. pl. 10.—8 B. upon the landlord cannot distrain, 5 B. & A. 692; unless a specific rent be agreed 322. 2 Taunt. 148.



said [place] in which, &c. and justly, &c. because he says, that the said plaintiff, for the space of [two years] and more, next before and ending on the — day of — in the year of our Lord —, held and enjoyed the said [dwelling-house] in which, &c. with the appurtenances, as tenant thereof to the said defendant, under and by virtue of a certain demise thereof before then made by the said defendant to the said plaintiff at a certain yearly rent of £— payable on, &c. [stating the days of payment] in every year. And the said plaintiff continued and was in the possession (p) of the said dwelling-house, with the appurtenances, in which, &c. from the said — day of — in the year aforesaid, until and at the said time when, &c. And because [£6. 11s.] of the rent aforesaid, that is to say [£5. 10s.] from the year ending on the said — day of — in the year of our Lord [1830,] and [£1. 1s.] part of a [year's] rent, from the — day of — [1828,] to the — day of — [1829,] left unpaid and in arrear on the said — day of — [1830,] and also at the said time when, &c. was due and in arrear and unpaid to the said defendant, he the said defendant, well avows the taking of the said [goods and chattels] in the said declaration mentioned, in the said [place] in which, &c. at the said time when, &c. the said time when, &c. being within the space of six calendar months after the said — day of — in the said year of our Lord [1830,] and during the continuance of the title and interest of the said defendant in the said [dwelling-house,] with the appurtenances, in which, &c. and during the possession of the plaintiff, and justly, &c. for and in the name of a distress for the said rent so due, in arrear, and unpaid as aforesaid; and which said rent now remains due, in arrear, and unpaid; and this the said defendant is ready to verify, wherefore he prays judgment, and a return of the said goods and chattels, together with the damages, &c. according to the form of the Statute in such case made and provided, to be adjudged to him, &c.

FOR  
RENT, &c.  
—  
ter the end  
of the  
term, un-  
der 8 Ann.  
c. 14 (o).  
[\*1052]

And defendant, by — his attorney, comes and defends the wrong and injury when, &c. and as bailiff of E. F. well acknowledges the taking the said [hay, grass, cattle, goods, and chattels,] in the said declaration mentioned, (except the said one-wheel cart) (r) in the said places in "which, &c. (s) and justly, &c. because he says, that the said plaintiff, for a long time, to wit, for the space of — years next before, and ending on the — day of — in the year aforesaid, and from thence until and at the said time when, &c. held and enjoyed the said closes called — and the said messuage and dwelling in which, &c. amongst other things (t), as

Cogni-  
ance for a  
distress for  
rent of cat-  
tle on  
common  
appurte-  
nant, un-  
der 11  
Geo. 2, c.  
19, s. 8.  
(q).

(e) The title of defendant need not be set out, see 11 Geo. 2, c. 19, s. 22. See a form against an administrator, 1 Hen. Bla. 465, and another form, where there was a custom to sow an away-going crop, 1 Hen. Bla. 6. See notes to 1 Chit. Col. Stat. 665.

(f) It need not be a tortious holding over, but a holding over of the whole premises, 4 B. & C. 51.—6 D. & R. 155, S. C. Therefore a landlord who permits his tenant to retain possession of a part of a farm after the tenancy has expired, may distrain, under the 8 Ann. c. 14, s. 6 and 7, on that part, within six months after the expiration of the tenancy, id.

(g) This cognizance was settled with great care by an eminent Pleader, afterwards raised to the Bench.

(r) By the stat. 11 Geo. 2, c. 19, s. 8, cattle

or stock feeding on a common, &c. belonging to the demised premises, may be distrained, but the law gives no authority to distrain the tenant's cart upon the common. That could only be distrained upon the demised premises, unless fraudulently removed to prevent its being distrained, see 1 Chit. Col. Stat. 671, 662, 663, notes.

(s) The declaration specified in what particular places the different articles were taken, some in a dwelling house, &c. and some on a waste.

(t) If the rent be not for any other land or premises than the two fields, and the messuage mentioned in the declaration, the words, "amongst other things," should be struck out.

[\*1053]

FOR  
RENT, &c.

tenant thereof to the said E. F. by virtue of a certain demise thereof to him the said plaintiff (*u*) therefore made at and under a certain yearly rent, to wit, the yearly rent of £— payable, &c. and because the sum of £— of the rent aforesaid, for the space of three years ending as aforesaid, on, &c. in the year aforesaid, and from thence until and at the said time when, &c. was due and in arrear from the said plaintiff to the said E. F. he the said defendant, as bailiff of the said E. F. well acknowledges the taking of the said hay, grass, cattle, goods, and chattels (except the said one-wheel cart) in the said places in which (*w*), the said cattle then being feeding and depasturing in and upon the said waste or common called Aston, and the said plaintiff in replevin then and there exercising and enjoying a right of common of pasturing thereon, appurtenant and belonging to the said demised premises, and justly, &c. as for and in the name of a distress for the said rent so due and in arrear to the said E. F. as aforesaid; and this, &c.—[*Conclude with a verification, as ante, 1043.*]

Avowry  
and cog-  
nizance on  
the 11  
Geo. 2, c.  
19, s. 1,  
for a dis-  
tress for  
rent on  
goods frau-  
dulent-  
ly removed  
from de-  
mised pre-  
mises (*x*).

[\*1054]

And the said defendants C. and D. by — their attorney, come and defend the wrong and injury, &c. and the said "C. in his own right, well avows, and the said D. as bailiff of the said C. well acknowledges the taking, &c. in the said [place] in which, &c. because they say, that the said plaintiff, for the space of [one year] next before, and ending on, &c. (*the day the rent fell due*) and from thence until and at the said time when, &c. enjoyed a certain [messuage, tenement, and premises,] situate and being, &c. as tenant thereof to the said C. under and by virtue of a certain demise theretofore made by the said C. to the said plaintiff, at and under the [yearly] rent of £— payable on, &c. (*stating the days of the payment*) in the said year; and because the sum of £— of the rent aforesaid, for [the year] aforesaid, ending on, &c. (*the day the rent fell due*) on that day, and from thence until and at the said time when, &c. was due, in arrear, and unpaid from the said plaintiff to the said C. and because the said goods and chattels in the said declaration mentioned, *before the said time when, &c. after the rent aforesaid became due and payable from the said plaintiff to the said C., to wit, on, &c.* were wrongfully, fraudulently, and unjustly removed and taken by the said plaintiff, from and out of the said [messuage, tenement, and premises aforesaid] so demised by the said C. to the said plaintiff, with intent wrongfully and unjustly to defraud the said C. of the said rent, and to prevent the said C. from distraining the same for the said arrears of rent, against the form of the statute in such case made and provided; and also because the said goods and chattels were afterwards, to wit, on the day and year last aforesaid, put and placed by the said plaintiff into the said place in

(*u*) If the original letting was not to him, these words must be omitted.

(*w*) The pleader doubted whether the right ought not here to be more particularly stated, but advised, that unless this general statement was specially demurred to, as not being sufficiently particular, it would suffice.

(*x*) See the notes and cases upon this enactment, and the third section of the 11 Geo. 2, c. 19.—*Ante*, vol. ii. 495 *d*; and 1 Chit. Col. Stat. 669, and notes. The avowry must be special, 4 Campb. 186. In order to support it, the goods must be the property of the tenant, 5 M. & S. 48; and the plea should

show it, *Id.* It has been said, that to justify the landlord distraining under this act, the rent must be in arrear at the time of the removal, 2 Saund. 284, n.—8 Esp. 15.—2 Saund. 2, n. b.—*Sed vide* 4 Camp. 186.—2 Saund. 284, *contra*, and the words of the act seem to be against the correctness of such a doctrine. How far a creditor may remove, 5 M. & S. 200, and what proof of fraudulent removal, 9 Price, 801.—3 D. & R. 501. The removal need not be clandestine as well as fraudulent, 4 D. & R. 538. It is immaterial at what time the goods are removed, whether by day or night, *Id.* *ibid.*—1 Car. Rep. 121.

which, &c. in the said declaration mentioned, the said C. in his own right, well avows, and the said D. as bailiff of the said C. well acknowledges the taking of the said goods and chattels in the said [place] in which, &c. in the said declaration mentioned, and justly, &c. at the said time when, &c. (the same being within thirty days next after the said fraudulent removal of the said goods and chattels from and out of the said [messuage, tenement, and premises,] so demised as aforesaid, by the said C. to the said plaintiff,) for and in the name of a distress for the rent so being due and in arrear, &c. And this, &c. wherefore, &c.—[*Conclude with a verification, as ante, 1043.*—[*If the goods were removed before the rent fell due or there be any doubt as to whether the removal was after that time, then add another avowry, like the above, omitting the words in italics.*]

FOR  
RENT, &c.

[*First avowry like the common one, ante, 1047, for the single rent ; second avowry, commencing as ante, 1043.*—Because he says, that before and at the said time when, &c. he the said defendant was seized in his demeane as of fee, of and in the [dwelling-house] in which, &c. and being so seized, he the said defendant heretofore, and before the said time when, &c. to wit, on, &c. at, &c. demised to the said plaintiff the said [dwelling-house] in which, &c. to hold the same to the said plaintiff from the day and year last aforesaid, for one whole year then next ensuing, and so from year to year so long as the said defendant and plaintiff should respectively please, at the yearly rent, or sum of [£18] payable quarterly,] to wit, on, &c. (*stating days of payment*) in each and every year, by even and equal portions; by virtue of which said demise the said plaintiff on the said, &c. entered into and upon the said demised premises, and became and was possessed thereof, and being so possessed, before the said time when, &c. and before the [1st of August, 1826,] to wit, on, &c. aforesaid, at, &c. (*venue*) he the said plaintiff having power to determine the said tenancy, by giving notice to quit hereinafter mentioned, gave to the said defendant notice that he the said plaintiff would quit and deliver up possession of the said dwelling-house and premises so by him holden as aforesaid, on the [1st of August] then next. And the said defendant further saith, that the said plaintiff did not nor would, on the day and year last aforesaid, quit or deliver up possession of the said [dwelling-house] and premises pursuant to the said notice, and then and there refused so to do; and on the contrary thereof, without the consent of the said defendant, held over and continued possession of the said [dwelling-house and] premises, from the day and year last aforesaid until and at the said time when, &c. although the said defendant during that time was entitled to the possession thereof from the said plaintiff, whereby the said plaintiff then and there became liable to pay to the said defendant during the time he the said plaintiff continued in possession of the said [dwelling-house and] premises after the said [1st of August, A. D. 1826,] as aforesaid, the yearly rent of [£36,] being at the rate of double the rent or sum which the said plaintiff would otherwise have paid, in case the said notice had not been so given: and because the sum of [£18] of the said rent of [£36] for [one half] year,

Avowry  
for double  
rent plain-  
tiff holding  
after notice  
to quit,  
given by  
him, on 11  
Geo. 2, c.  
19 (y).

A landlord may distrain for double rent if the tenant holds over after his own notice, but not for double value where he holds over after the landlord's notice, see 1 Chit. Stat. 674, and notes; and see the form of

declaration for double rent, ante, 495; for double value, ante, 493. It seems that an avowry for double rent will be maintained, though the single rent only be due, see 4 B. & C. 922.

FOR  
RENT, &C.

next before and ending on the said [1st day of August, A. D. 1826,] aforesaid, and from thence until and at the said time when, &c. was due and in arrear from the said plaintiff to the said defendant, he the said defendant well avows the taking of the said goods and chattels in the said declaration mentioned, in the said [dwelling-house] in which, &c. and justly, &c. as for and in the name of a distress for the said rent so due and in arrear to the said defendant as aforesaid, and which still remains due and unpaid. And this, &c.—[*Conclude with a verification, as ante, 1048.*]

[\*1055] Cognizance as bailiff of an executor under 82 Hen. 8, c. 37, for a distress rent due to deceased (z).

\*And the said defendant, by — his attorney, comes and defends the wrong and injury, when, &c. and as the said bailiff of C. J. B. esq. executor of the last will and testament of Sir C. B. knt. deceased, well acknowledges the taking of the said [goods and chattels] in the said declaration mentioned, in the said [dwelling-house] in which, &c. and justly, &c. because he saith, that the said plaintiff for a long space of time and during all the time which the rent hereinafter mentioned was accruing due, to wit, continually from the — day of —, in the year of our Lord —, until and upon the — day of — in the same year, and from thence until the time of the death of the said Sir C. B. which happened heretofore, to wit, on, &c. at, &c. (*venue*) held and enjoyed the said [dwelling-house] in which, &c. with the appurtenances, as tenant thereof to the said Sir C. B. under and by virtue of a certain demise thereof theretofore made, at and under the yearly rent of £— payable quarterly, to wit, on, &c. [*stating the quarterly days*] in each and every year (a); and because a large sum of money, to wit, the sum of £— of the rent aforesaid, for the space of one quarter of a year of the said time, ending on, &c. became and was due and in arrear to the said Sir C. B. deceased, in his life time, and continued so in arrear and unpaid until and at the time of the death of the said Sir C. B. and from thence until and at the said time when, &c. continued in arrear from the said plaintiff to the said C. J. B. as such executor as aforesaid, and because the said plaintiff remained in possession of the said [dwelling-house] in which, &c.

[\*1056]

from the death of the said Sir C. B. until the said time when, &c. the said defendant as bailiff of the said C. J. B. as such executor as aforesaid, well acknowledges the taking of the said [goods and chattels] in the said declaration mentioned, in the said [dwelling-house] in which, &c. and justly, &c. as for and in the name of a distress for the said rent so due and in arrear, as aforesaid, and which said rent still remains due, in arrear, and unpaid; and this, &c.—[*Verification, as ante, 1048, and conclude with a profert of the letters testamentary, as ante, 35, and then insert a cognizance for rent due to executor as a devisee in his own right, not stating the derivative character, if there be any ground for such a cognizance.*]

(z) This plea held good, see 8 Moore, 608—1 B. & B. 279, S. C.—8 Taunt. 159.—2 Moore, 48.—4 Id. 407.—2 Bingh. 193.—See Bradby on distresses, 74, &c. and the notes, 1 Chit. Col. Stat. 659. *Quære*, whether this statute extends to all rent services reserved upon leases for years as well as upon freehold leases, & Moore, 48. How to plead to, see 2 B. & B. 86.—3 Moore, 608.—1 B. & B. 279, S. C.

(a) It is unnecessary for the defendant to show how the plaintiff became entitled to, or held the premises, 2 Moore, 48.—8 Taunt. 159, S. C. The testator's title need not be shown; neither need it be shown that the executor was entitled to distrain, at least the omission of these averments is immaterial after verdict, 8 Moore, 608.—1 B. & B. 279, S. C.

[*Commencement of avowry, as ante, 1042.*—Because he says, that he the said plaintiff for a long space of time, to wit, for the space of — next before, and ending on the — day of — A. D. — and from thence until, and at the same time, when, &c. held and enjoyed one undivided moiety, (the whole into two equal moieties to be divided) of the said dwelling-house, in which, &c. with the appurtenances, as tenant thereof to the said defendant, under and by virtue of a certain demise thereof to the said plaintiff theretofore made, at and under the yearly rent of £— payable quarterly, on the, &c. [*stating the entire rent and the days of payment*] in every year, by equal and even portions; and because one undivided moiety of the sum of £— of the rent aforesaid, for the space of — ending as aforesaid, on the said — day of — A. D. — aforesaid, and from thence until, and at the said time when, &c. was due and in arrear from the said plaintiff to the said defendant, he the said defendant well avows the taking of the said goods and chattels in the said declaration mentioned, in the said dwelling-house, in which, &c. and justly, &c. as for and in the name of a distress for the said undivided moiety of the said rent so due, and in arrear and unpaid as aforesaid, and which is still due, in arrear, and unpaid; and this he the said defendant is ready to verify, wherefore he prays judgment, and a return of the said goods and chattels, together with his damages, &c. \*according to the form [\*1057] of the Statute in such case made and provided, to be adjudged to him, &c. And for a cognizance in this behalf, the said defendant by leave of the court here, for this purpose first had and obtained, according to the form of the statute in such case made and provided, as bailiff of G. H. well acknowledges the taking of the said goods and chattels in the said declaration mentioned, in the said dwelling-house, in which, &c. and justly, &c. Because he says, &c.—[*Cognizance as bailiff of the other tenant in common for an undivided moiety of the rent due him, similar to the above avowry, and see ante, 1048, 1049, as to the language of the cognizance.*]

FOR  
RENT, &c.  
Avowry by  
one tenant  
in com-  
mon, for  
rent due to  
him (b)

Cogniz-  
ance by  
him as  
bailiff of  
the other  
tenant in  
common.

[*First plea, non cepit, as ante, 1042; second plea as follows:*]—And for an avowry in this behalf, by leave of the court here, for this purpose

POOR RATE.  
Avowry  
for poor's  
rate (c).

(b) See the forms, 6 T. R. 246.—8 Went 328. See form of avowry by a joint-tenant, with 328. The above form of avowry must be adopted where the avowment has not a right to the entire rent, see 6 Bing. 104, ante, 247, n.—Tenants in common cannot join in avowry for rent, though they must join in avowry for damage feasant, 5 T. R. 246.—Wm. Jones, 258.—2 Hen. Bla. 886. One joint-tenant may, without the assent of his fellows, appoint a bailiff to distrain for rent due to all the joint-tenants, 4 Bing. 562; and in general if a party has an interest to entitle him to distrain, his being bailiff is not necessary, Year Book, 15 Hen. 7, 17 a.—In 1 B. & B. 465.—5 Moore, 297. S. C. it was held that an avowry by one of several co-heirs was good kind, and a cognizance as bailiff of the other co-heirs need not aver an authority to distrain from the other co-heirs. The avowry for rent must be *de und medietate* of the whole rent, and not of a certain sum, which amounts to a moiety, Carth. 489, 1 Ld.

Raym. 428.—1 Salk. 391.—5 Mod. 25.—Bac. Abr. Joint-tenant, &c. K.—*Sed vide per* Abbott, C. J.—4 B. & C. 158.—In 8 Salk. 207.—5 T. R. 247, it is said, if three tenants in common distrain thirty beasts, they must each of them avow separately for ten. Where land was demised by four persons (whose original title did not appear) at one entire rent to be divided in equal portions, and one of the four distrained upon the tenant for her own share of the rent, it was held the distress was regular; for whatever might have been the interest of the landlords as between themselves, as between them and the terre-tenant, they were tenants in common, and entitled each to a separate distress, 1 M. & Y. 107.

(c) The stat. 43 Eliz. c. 2, s. 19, gives the general issue not guilty in a case of a distress for poor rates, and also the above special plea. See form, 2 Rich. C. P. 855.—See 2 Moore, 417. The avowant in this case is only entitled to single costs under the statute, 1 B. & B. 517.

**POOR RATE.** first had and obtained, according to the form of the Statute in such case made and provided, as said defendant, as churchwarden of the parish of — in the county of — aforesaid, and the said E. F. as overseer of the same parish, well avow the taking of the said [stack of hay] of the said plaintiff, as in the said declaration mentioned, in the said [place] in which, &c. and justly, because they say, that the seizing, taking, and detaining the said [stack of hay] as in the said declaration mentioned, were done by them the said defendant and E. F. by authority of a certain act of parliament made in the parliament of the lady Elizabeth, late queen of England, holden at Westminster, in the county of Middlesex, intituled, "An Act for the relief of the poor," and according to the tenor, purport, and effect of the same act. And this, &c.—[*Conclude with a verification, as ante, 1043.*]

[1058] [\**Commencement of avowry, as ante, 1942.*—Because he saith, that the said place in which, &c. (e), now is, and at the said time when, &c. was the close, soil, and freehold of the said defendant (f), and because the said [cattle], at the said time when, &c. were in the said place in which, &c. eating up the grass there then growing, and doing damage there to the said defendant, he the said defendant well avows the taking of the said [cattle] in the said place in which, &c. and justly, &c. as for and in the name of a distress for the said damage so there done and doing as aforesaid. And this, &c.—[*Conclude with a verification, as ante, 1043.*]

The like by a tenant from year to year, the lessee being a free-holder (g). [ *Commencement of avowry or cognizance, as ante, 1042.*—Because he says, that G. H. before the said time when, &c. and at the time of the making of the demise hereinafter mentioned, was seized of and in the said place in which, &c. with the appurtenances, in his demense, as of fee; and being so seized he the said G. H. before the said time when, &c. to wit, on, &c. at, &c. (venue) aforesaid, demised (h), the said place in which, &c. (i) with the appurtenances, to the said defendant, to have and to hold the same to the said defendant for one whole year from thence next ensuing, and fully to be complete and ended, and so from year to year as long as they the said G. H. and defendant should respectively please, by virtue of which said demise he the said defendant afterwards, and before the said time when, &c. to wit, on the day and year last aforesaid entered into the said place in which, &c. with the appurtenances, and became, and until and at the said time when, &c. was possessed thereof

(d) See the form, Plead. A. 471, 575.—2 Rich. C. P. 7, 358.—Morg. 600. As to this plea in general, see 1 Saund. 347 d. note 6. It is necessary to set forth the nature of the plaintiff's title and it is not sufficient, as in trespass, merely to say that the defendant was lawfully possessed, &c. 2 B. & P. 359.—2 Saund. 284 d, 285.—1 Saund. 347 d. How tenants in common are to avow, see 2 Hen. Bla. 386.

(e) Where the defendant is only seized of part of the field, &c. mentioned in the declaration, it is necessary in the avowry to qualify the statement of the seisin accordingly, 1 Saund. 347 d, n 5; and see 2 Hen. Bla. 386.

(f) In an avowry by a freeholder, the words *close, soil, and freehold*, are sufficient, 1 Saund. 347 d, note 6.—2 Id. 206 a. If a seisin be shown, what must be stated, see 2

Lutw. 1280, 1. If under a lease, state the seisin in fee of the lessor and the lease, with profit, and then state the entry as above. As to freehold in right of wife, and pleading the seisin in general, see ante, 560 to 592.

(g) See form, 2 Rich. C. P. 339. It is not sufficient merely to state that the defendant was lawfully possessed, &c. but the seisin in fee and the demise must be stated according to the fact, 2 B. & P. 359.—2 Saund. 284 d, 285. See the mode of stating different seisins in fee and demise by lease, &c. ante, 560 to 592, and the Index, "*Title Plead.*"

(h) If the demise was by indenture of lease, then state it, and the defendant's entry, as ante, 549 to 551.

(i) See the cases in 6 B. & C. 34.—10 Moore, 264.—Ante, 1058.

and because the said cattle in the said declaration mentioned at the said time when, &c. were wrongfully in the said place in which, &c. treading down and depasturing the grass there then growing; and doing damage there to the said defendant, he the said defendant well avows the taking of the said cattle in the said place in which, &c. and justly, &c. as for and in the name of a distress for the said damage so there done and doing as aforesaid. And this, &c.—[*Conclude with a verification, as ante, 1043.*]

DAMAGE  
FEASANT.

[*Commencement of avowry, or cognizance, as ante, 1042.*]—Because he says, that the said place in which, &c. (*k*) now is and from whereof the memory of man is not to the contrary, hath been and still is situate within the manor, of, &c.—*Here state that the locus in quo was copyhold, and the admission of the copyholder, and the entry of such copyholder, as ante, 565, and then state the demise from year to year to the defendant, and the distress damage feasant, as ante, 1058, or if the defendant were tenant under an indenture of lease, state the lease and defendant's entry, as ante, 549, to 551; and conclude with a verification, as ante, 1043.*]

The like as  
a copy-  
holder, or  
his tenant.

[*Commencement of avowry or cognizance, as ante, 1042.*]—Because he says, that before and at the said time when, &c. he the said defendant was and still is seised in his demesne as of fee (*m*), of and in a certain messuage and land, with the appurtenances, situate, lying and being in the parish of —aforesaid (*m*) and that he the said defendant, and all those whose estates he now hath, and at the said time when, &c. had, of and in the said messuage and land, with the appurtenances, from the time being, from time whereof the memory of man is not to the contrary (*n*), have had, and have been used and accustomed to have, and of right ought to have had, and the said defendant still of right ought to have, for him-

Avowry  
for a dis-  
tress dam-  
age feasant  
by a free-  
holder  
having  
right of  
common in  
the locus in  
quo (*l*).

[\*1060]

Prescrip-  
tive right  
of common.

(*k*) Or a certain part, to wit, — acres of the said place in which, &c. see 1 Saund. 847 d, note 5.

(*l*) See the several avowries and cognizances, indexed in 8 Wentw. cxliv. to cccxvii. and Bente, 287, 8. This form will suffice to show the mode in which an avowry damage feasant by a commoner, states the facts, and see 1 Saund. 846, note 2. The different forms of pleading title, ante, 560 to 592, and the forms set, in Trespass, will sufficiently enable the pleader to frame any other avowry or cognizance, which may occur in the ordinary course of practice. See Mr. Woolrich's useful work on Commons, 284 to 308.

(*m*) In a plea of this nature the defendant's title must be set out accurately, 4 T. R. 781—Cro. Car. 599.—Cro. Jac. 486. In pleading a right of common by prescription, the defendant must show a seisin in fee of the land in respect of which he claims, and prescribe in the *que estate* for the right. Where a defendant is justified under a right of common of pasture, by showing a demise from a freeholder for life of the land in respect of which he claims, and averred that he, the defendant, and all those whose estate he then had, and

his landlord from time, &c. had common of pasture in respect of the demised premises, it was held, on demurrer, that the plea was bad, 8 Y. & J. 93.

The quality and quantity of the estate of the climates should be stated accurately, and where the plaintiff prescribed in a *que estate* to have common, together with certain tenants of a manor, a demurrer was allowed, because he had not said whose tenants they were, or how many had the right, 2 Lev. 178.

A customary freeholder may plead his right in a *que estate*, 2 Ld. Raym. 1188.

It is not necessary to allege that the defendant was in possession, as that is implied from the allegation of a seisin in fee, until the contrary be shown. 4 M. & S. 392—16 East, 848. It is a rule, that where a feoffment is pleaded, it shall be intended to have been by deed, Cro. Car. 482.—Cro. Jac. 411.

(*n*) The will must be stated, and this accurately. see Cro. Jac. 288.—5 T. R. 412.—Woolrich, 287.

(*o*) The omission of these words might, it seems, be aided after verdict, 8 T. R. 147; but not on demurrer, id.; and see Godb. 847.

DAMAGE  
FRAGRANT.

self and themselves, his and their tenants and farmers, occupiers of the said messuage and land with the appurtenances, common of pasture, in, upon, and throughout the said place in which, &c. called — (o), for all his and their commonable cattle (p), levant and couchant, (q), in and upon the said messuage and land, with the appurtenances, every year, at all times of the year (r), as to the said messuage and land, with the appurtenances belonging and appertaining (s). And because the said cattle in the said declaration mentioned, at the said time when, &c. were in and upon the said place in which, &c. called — depasturing and destroying the grass then and there growing and being, and doing damage there, so that the said defendant could not have or enjoy his said common of pasture there, in so ample a manner as he ought to have had and enjoyed the same (t), he the said defendant well avows the taking of the said cattle in the said declaration mentioned, in and upon the said place in which, &c. called — and justly, &c. as for and in the name of a distress for the said damage so there done and doing as aforesaid. And this, &c.—[*Conclude with a verification, as ante, 1048.*]

(o) This seems necessary, see 5 T. R. 412, n.

(p) The prescription must be set out accurately and precisely according to the facts. If the entire prescription, as stated, be not proved, the defendant will fail, see Woolrich on Com. 287, 288. Where a justification was made for common in 500 acres, and it turned out that five of them had been released by an ancestor of the plaintiff, the court held that the prescription had failed, Noy. Rep. 67.—Where the prescription was for one hundred sheep, and the jury found a right for one hundred sheep and six cows, the court were of opinion the prescription was well stated, Cro. Elis. 722; but if the finding of the jury had been for one hundred and twenty sheep, and no more of the same kind, it would have been otherwise, Id. 728; and see ante, 800.

(q) This is necessary, see 1 Saund. 28 a, 5th edit.

(r) This must be stated accurately. The statement of a right of common to be at all times of the year, without saying in each year will be good after verdict. Hutt. 71. If any part of the year be excepted it must be stated accordingly, see 8 Bingh. 401.

Where a right was pleaded in respect of a field which ought to have been open and common on or before the 16th of October, when the corn was cut and carried, and from thence for a long time, to wit, for three weeks and upwards, and it was then pleaded, that the plaintiff put in his cattle at the time when the field ought to have been so common as aforesaid, the court held the prescription bad for uncertainty, for it did not appear from the plaintiff's showing that the corn must necessarily have been cut and carried by the 16th

of October, nor even before the end of three weeks after that day; and they said, that although the words, "three weeks and upwards," were laid under a *videlicet*, yet, supposing them struck out, there would appear an unqualified length of time which could not be allowed, and the plaintiff had even omitted to aver that his cattle were put in during three weeks, and judgment was entered for the defendant *non obstante veredicto*, 2 B. & P. 257. It would also have been advisable to have averred that the corn had been cut and carried. So, where the defendant avowed by reason of a right of common, and said that he and all those, &c. free time whereof, &c. had been accustomed to have, and of right during all the time aforesaid ought to have had, and still of right ought to have common pasture in the *locus in quo*, there was a demurrer setting forth the uncertainty of such prescription, that it did not appear whether the defendant had common every year, or at what period of the year, and therefore that it was not clear that the defendant had any right at all, and the court held the avowry bad, but gave leave to amend, 2 B. & P. 859. It is said that if A. be seignior of twenty acres, to which common is appendant, and enfeoff B. of ten acres, B. must prescribe specially, to wit, that A. had common appendant to the whole till such a day, and then B. purchased, after which he put in his beasts according to due appointment, 4 B. & P. 37.—See Woolrich, 288, 9.

(s) As to this, see 1 Saund. 346, c.—Ante 801, n.

(t) This seems necessary, see 1 Saund. 346 c.—8 Lev. 104—*See vide Styles*, 423.



## \*PLEAS IN BAR IN TRESPASS.

IN  
GENERAL.  
General is-  
sue (a).

*In the King's Bench, (or "C. P." or "Exchequer.")*

C. D. } ——— Term, ——— Will. 4. The like by  
ats. } And the said defendant, by E. F. his attorney, comes and de- several de-  
A. B. } fends the force and injury, when, &c. and says, that he is not guilty fendants.  
of the said supposed trespasses (b) above laid to his charge, or any or  
either of them, or any part thereof, in manner and form as the said plain-  
tiff hath above thereof complained against him. And of this he the said  
defendant puts himself upon the country, &c.

C. D. and others, } And the said defendants by E. F. their attorney, The like by  
ats. } come and defend the force and injury, when, &c. and several de-  
A. B. } say, that they are not, nor is any or either of them, guilty of the said sup- fendants.  
posed trespasses above laid to their charge, or any or either of them, or  
any part thereof, in manner and form as the said plaintiff hath above com-  
plained against them, and of this the said defendants put themselves upon  
the country, &c.

C. D. } And the said defendant by E. F. his attorney, comes and de- The like to  
ats. } fends the force and injury, when, &c. and as to the coming with a part with  
A. B. } force and arms, &c. and whatever else is against the peace (d) of our lord special  
the now king, and as to all the supposed trespasses in the said declaration plea to the  
mentioned, except as to the [breaking and entering the said close called, residue (c).  
the said declaration mentioned, and in which, &c. and the several tres-  
passes supposed to have been committed by the said defendant therein,

(a) See form, 1 Rich. C. P. 148.—Plead. A. Very few matters of defense can be  
in evidence under this plea, which in  
merely puts in issue the facts stated  
the declaration. In trespass for injuries to  
person, matters in justification or excuse  
not be pleaded specially, and in trespass to  
real property the same rule prevails, ex-  
in the instance of a distress for rent,  
when made upon the demised premises  
may be given in evidence under the general  
plea, 11 Geo. 2, c. 19, s. 21.—1 Esp. Rep.  
71. In trespass to real property, the de-  
fendant may, under this plea, give in evidence  
his right of possession of the *locus in quo*, or  
of any other person under whom he jus-  
tifies. 7 T. B. 354.—8 Id. 408. Rights of  
way and other easements must be pleaded  
specially. As to this plea in general, see ante,  
§ 1 Index, "General issue."

(b) As a plea to a declaration for an as-  
sault and battery, and tearing clothes, that  
the defendant was not guilty of the said sup-  
posed assaults in manner and form as the

plaintiff complained, &c. it was held that the  
*modo et forma* included a denial of the battery  
and *laceravit* as well as the assault, 8 Bing.  
185. 10 Moore, 602, S. C.

(c) See form, Plead. A. 485. Before the  
stat. 4 Ann. c. 16, which allows several pleas  
in court of record by leave of such courts, this  
was the usual mode of pleading, where the de-  
fendant could not justify all the trespasses  
mentioned in the declaration, 1 Saund. 10, 24,  
82, 296, and where the defendant may not be  
able to obtain leave to plead double, or may  
wish to prevent the plaintiff's counsel from  
having the reply at the trial, this mode may  
still be adopted, 8 Campb. 366, 368; so in  
order to save costs, it is frequently advisable  
to confine the plea of not guilty to the tres-  
passes which can be justified, leaving the  
plaintiff at liberty to take judgment and exe-  
cute a writ of inquiry as to the trespasses  
which cannot be justified, as in 2 East, 83.

(d) This denial is to save a fine to the king,  
per Bayley, J. 2 Stark. 518.

IN  
GENERAL.

says, that he is not guilty thereof in manner and form as the said plaintiff hath above thereof complained against him; and of this he puts himself upon the country, &c. And as to residue of the said supposed trespasses in the said declaration mentioned, the said defendant saith, that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he saith, &c.—[*Here state the subject-matter of the defense, and conclude as usual.*]

Accord  
and satis-  
faction.

*The plea of accord and satisfaction in trespass is similar to that in case, ante, 1031, adopting the term "trespasses" instead of "grievances." See also the pleas, 5 East, 294. It is necessary to plead specially, 3 Burr. 1353. — 1 Bla. Rep. 388, S. C.*

By one de-  
fendant in  
an action  
against  
two, accord  
and satis-  
faction by  
the other,  
after action  
brought  
(e)

[\*1062]

[*First plea, general issue, as ante, 1061; second plea as follows:*]—And for a further plea in this behalf, the said defendant W. P. by leave of the court here, for this purpose first had and obtained, according to the form of the statute in such case made and provided, says, that the said plaintiff ought not further to have or maintain his aforesaid action thereof against him the said defendant W. P. because he says, that the said supposed trespasses were committed by the said W. P. (if at all committed by him) jointly with the said defendant G. S. [and by his command], and that after the committing of the said several supposed trespasses, in the said declaration mentioned, and after the commencement of this suit, and before the day of pleading this plea, to wit, on, &c. [*day of accord or about it.*] in the county aforesaid, it was agreed between the said plaintiff and the said defendant G. S. that the said G. S. should pay to the said plaintiff and the said plaintiff should receive a certain sum, to wit, the sum of £— (*the sum paid*), in satisfaction and discharge of the said supposed trespasses, and of all damages by the said plaintiff sustained by reason of the committing thereof, and of all costs by the said plaintiff sustained and incurred in prosecuting the said action against the said defendant; and the said W. P. further saith, that in pursuance of such agreement, the said G. S. then and there paid to the said plaintiff the said sum of £— and he the said plaintiff, then and there accepted the same in full satisfaction and discharge of the said supposed trespasses, and of all such damages and costs as aforesaid, and this he the said defendant W. P. is ready to verify; wherefore he prays judgment if the said plaintiff ought further to have or maintain his aforesaid action thereof against him, &c.

Arbitra-  
ment and  
release.

*As to the plea of arbitrament, see ante, in assumpsit, 927, which may be easily adapted to trespass. A release must be specially pleaded, see 3 Burr. 1353.*

Judgment  
by verdict  
recovered  
by defend-  
ant against  
plaintiff,  
for same  
trespasses.  
(f).

[*First plea, general issue; as ante, 1061; second plea, actio non.*]—Because he says, that the said plaintiff, heretofore, to wit. in —

(e) See a plea in assumpsit, of payment after action brought, post, Addenda, and 5 B. & A. 886.

(f) See plea of judgment recovered in assumpsit, ante, 929 and the notes there as to

the form and plea which should be attended to. This defense cannot in trespass be given in evidence under the general issue. See a replication, denying the judgment to be for the same trespass, post, 1218.

IN  
GENERAL

Term, in the — year of the reign of our said lord the king, in the court of our said lord the king, before the king himself, [or if in C. P. "before Mr N. C. Tindal, knight, and his majesty's justices of the bench], at Westminster, in the county of Middlesex, by bill without the writ, [or if in C. P. or by original, say, "by the writ,"] of our said lord the king, pleaded the said defendant in a certain plea of trespass for the committing the very same supposed trespasses in the said declaration above mentioned, whereupon the said defendant afterwards, to wit, in the said Term, pleaded that the said defendant was not guilty of the said supposed trespasses, or any or either of them, and issue was thereupon joined upon the said plea, between the said plaintiff and the said defendant, and thereupon, to wit, at the assizes holden in and for the county of Surrey, on, &c. [commission day, or about it,] the said issue came on to be tried, and was there and then tried in due course of law, by a jury of the country, duly summoned, tried, chosen, and sworn in that behalf, between the said plaintiff and the said defendant, which jury, upon the said trial, then and there upon their oaths, found that the said defendant was not guilty of the said supposed trespasses, or any or either of them in manner and form to the said plaintiff in his said bill in that behalf complained against him, and such proceedings were thereupon had in the said court, in that plea of suit last aforesaid, that afterwards, to wit, in — Term, in the — year of the reign of our said lord the king, it was considered in and by the said court, that the said plaintiff should take nothing by his said bill in that suit, but that he and his pledges to prosecute, should be in mercy, and that the said defendant should go thereof without day, &c. And it was further considered by his Majesty's court there, that the said defendant should recover against the said plaintiff £— for his costs and charges by him laid out about his defense in that behalf, by the court of our said lord the king now there adjudged to the said defendant, and with his assent, according to the form of the Statute in that case made and provided, and that the said defendant should have execution thereof, as by the record and proceedings thereof, still remaining in the said court of our said lord the king, before the king himself, at Westminster aforesaid, more fully and at large appears, which said judgment still remains in full force and effect, not in the least reversed or made void; and that the said defendant is ready to verify by the said record; whereupon he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

*Under the former statutes, 18 Eliz. c. 7.; and 1 Jac. 1. c. 15. s. 16. Plea justifying trespass under a commission of bankruptcy issued against a party; but a special plea is no longer necessary, the 6 Gen. 4, c. 16. s. 44. allows the defendant, in such case, to plead the general issue, and give that act and the special matter in evidence on the trial, and that the matter was done under the authority of that act.— See the cases in 5 Bing. 270.—8 Bar. & Cres. 697. See the several works of Messrs. Eden, Cullen, Montague, Espinasse, and Archbald, on bankruptcy.*

[\*1063]

Plea of  
tender by

[First plea, general issue; second plea as follows:]—And the said defendants, for a further plea, as to the breaking and entering the said

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GENERAL.  
—  
officers of  
excise and  
customs  
(g).

[\*1064

dwelling-house, warehouse, and shops, of the said plaintiff, in the first count of the said declaration mentioned, and then and there making the said noise and disturbance therein, and staying and continuing therein making such noise and disturbance for the space of time in that count mentioned, and during all that time disquieting and disturbing the said plaintiff in the quiet and peaceable possession and enjoyment of the said dwelling-house, warehouse, and shops, and then and there forcing open, breaking open, spoiling, breaking down, breaking to pieces the boxes, trunks, drawers, desks, bureaux, and book-cases, and breaking to pieces, spoiling, and destroying, the said bolts, bars, chains, hinges, and fastenings, and throwing about, tumbling, dirtying, damaging, breaking to pieces, spoiling, and destroying the said furniture, stock in trade as a linen-draper, goods, wares, and merchandize of the said plaintiff, then being and found in the said dwelling-house, warehouse, and shops, in the said first count of the said declaration mentioned, and also as to the breaking and entering the said dwelling-house of the said plaintiff in the said second count of the said declaration mentioned, and then and there making the said noise, disturbance, and affray therein, and then and there forcing open, breaking open, and spoiling the said other boxes, trunks, drawers, desks, bureaux, and book-cases, of the said plaintiff, in the said second count of the said declaration mentioned, above supposed to have been done by the said defendants, they the said defendants (h), by leave, &c. say, [*actio non.*]—Because they say, that [the said dwelling-house, in the said first count of the said declaration mentioned, and the said dwelling-house in the said second count of the said declaration mentioned, are, and at the several times when, &c. were the same, and not other or different (i); and that the said boxes, trunks, drawers, desks, bureaux, and book-cases, in the said first count mentioned, and the said boxes, trunks, drawers, desks, bureaux, and book-cases, in the said second count mentioned, are the same, and not other or different; and that] before and at the time of committing the said trespasses, they the said W. and S. were respectively officers of and belonging to the customs of our said lord the king, acting under the authorities or powers to them given by the several Statutes made, and now in force, for seizing the duties of the customs. And they the said J. J. W. and J. C. were respectively officers of and belonging to the excise of our said lord the king, and aiding and assisting the said W. & S. as such officers as aforesaid; and that the said several trespasses in the said declaration mentioned, whereof and for which the said plaintiff hath brought his action in that behalf against the said defendants, were done by the said W. and S. in the execution of their said offices, under the said authorities and powers, and long after the same offices respectively granted to them, and by the said other defendants, as such assistants of the said W.

(g) See the form of plea in case, ante, 1030. The 7 & 8 Geo. 4, c. 53, s. 116. an officer of excise, or any person employed in the revenue of excise, or any person acting in the aid and assistance of such officer or person, may tender amends within one month after notice of action given, (as required by the 114th section of that act) and he may plead in bar if not accepted. By the 117th section the defendant may, if he has neglected to tender amends, or

has not, tendered sufficient amends, pay money into court before issue joined.

(h) This recital of the trespass intended to be justified, must depend upon the circumstances of the case. In some cases the whole trespasses, as stated in the declaration, may be justified, and then this recital is unnecessary.

(i) This mode of pleading is objectionable on demurrer, see ante, vol. i. but sometimes it is advisable to be adopted, to avoid several pleas.

IN  
GENERAL.

and S. as aforesaid, and by their order, and in their aid, and in execution, or by reason of their offices as officers of excise as aforesaid, to wit, at the parish aforesaid; and that after the committing of the said trespasses, to wit, on the — day of — and not before (*k*), a notice in writing, that the said plaintiff intended to commence and prosecute, in the court of our said lord the king of his Exchequer, an action of trespass against the said defendants for the same trespasses, was given and delivered to each of them the said defendants according to the form of the Statute in such case made and provided, to wit, at, &c. (*venue*) by D. B. who was then and there the attorney of the said plaintiff in that behalf. And the said defendants further say, that they the said defendants, afterwards, and within one calendar month next after such notice given to them respectively as aforesaid, to wit, on the same day and year last aforesaid, &c. tendered to the said plaintiff the sum of £— as and for amends for the said several trespasses, and which was then and there sufficient amends for the said trespasses (*l*), and that one R. J. for and on behalf of the said defendant, tendered to the [said D. as the attorney of the] said plaintiff, the sum of £— as and for the costs of the said notice so given as aforesaid, and which was then and there a sufficient sum in that behalf; but the said plaintiff and the said attorney of the said plaintiff respectively, did not then and there accept the same sums of £— and £— so tendered to them respectively as aforesaid, but then and there severally and respectively wholly refused to accept and receive the same from the said defendants, or from the said R. J. on behalf of the said defendants, and this, &c. wherefore, &c.

[\*1065]

[*First plea, general issue, as ante, 1061*].—And for a further plea in his behalf, [as to (*n*) the said assaulting, beating, and ill-treating the said plaintiff, and imprisoning him, keeping and detaining him in prison for the said space of time in the said declaration mentioned, by the said defendant above supposed to have been done, &c.] he the said defendant by leave of the court here, for this purpose first had and obtained, according to the form of the Statute in that case made and provided, says, that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says, that he the said defendant at the said time when, &c. was and long before had been, a justice of our lord now king, assigned to keep the peace of our said lord the king, in and for the said county of — and also to hear and determine divers felonies, trespasses, and other misdemeanors done and committed within the said county. And the said defendant further says, that the said trespasses in said declaration mentioned, above supposed to have been committed by the said defendant, were done and committed by the said defendant in the execution of his said office of justice of the peace within the

Tender of  
amends by  
a justice of  
the peace,  
under 24  
Geo. 2, c.  
44, s. 2.  
(*m*).

(*k*) Vide the 7 & 8 Geo. 4, c. 58, s. 116.

(*l*) The original plea omitted this allegation; but it seems necessary. See forms, post p. 6.

(*m*) The statute also authorizes the plea of general issue. As to this plea in general, see *Abbr. Tender*, p. 6, and the preface, 9 *Wentw. Index*, cxxxii. See 8 *Burn*, 4th ed. 495, 6. In another precedent it is thought to be advisable in a third plea to plead the tender of the 20s. mentioned in

the act; for the preparing and serving the notice of action, together with the sum tendered as amends for the trespass. It is not necessary that the party who pleads a tender under this statute, should bring the money into court, *Bac. Ab. Tender*, P. 6. See plea under the 43 Geo. 3, c. 141.—1 *Marsh*, 220.

(*n*) Sometimes the whole of the trespasses, as stated in the declaration, are justifiable, and then this confinement of justification to part of the alleged trespasses is not necessary.

IN  
GENERAL.

said county, after the 24th day of June, 1751, and that he the said defendant, after the committing of the said trespasses by him above supposed to be done, and before the exhibiting of the bill of the said plaintiff against the said defendant in this behalf, [or, *if in C. P. or by original*, "before the commencement of this suit,"] and within one calendar month next after any notice in writing given, or any writ or process intended to be brought against the said defendant by the said plaintiff for the cause aforesaid, as required by the Statute in such case made and provided, that is to say, [\*1066] "on the — day of — A. D. — at, &c. (*venue*) aforesaid, tendered and offered to pay to the said plaintiff a certain sum of money, to wit, the sum of £— of lawful money of Great Britain, as and for amends for the said trespasses, which said sum of £— so tendered and offered as aforesaid, was sufficient amends for the said trespasses, and which said sum of £— so tendered in amends for the said trespasses, the said plaintiff then and there wholly refused to accept and receive. And this, &c.— [*Conclude with a verification, as ante, 907, sixth form.*]

Plea of disclaimer of title to locus in quo, and tender of amends (o).

[*Actio non, as ante, 906, first form.*].—Because he says, that he the said defendant, at the said times when, &c. had not, nor claimed to have, nor hath he, nor doth he now claim to have, but disavoweth and disclaimeth to have any title or interest in said closes, in which, &c.; and the said defendant further saith, that the said cattle in the said declaration mentioned, a little before any of the said times when, &c. had, without the knowledge and against the will of the said defendant, strayed and escaped into the said closes of the said plaintiff, in which, &c. and at the said times when, &c. were in the said closes in which, &c. doing damage there as in the said declaration mentioned; wherefore he the said defendant, as soon as he had knowledge thereof, to wit, at said the several times when, &c. in order to prevent further damage there to the said plaintiff, and to drive his said cattle out of the said closes, entered the said closes, in which, &c. by the most convenient and proper ways there, for the purpose of driving the said cattle out of the said closes, and then and there at the said times when, &c. by the most proper and convenient ways there, as it was lawful for him to do, he doing as little damage on those occasions as he possibly could, and in so doing he the said defendant, with his feet in walking necessarily and unavoidably trod down, trampled upon, consumed, and spoiled, a little of the oats of the said plaintiff, there then growing and being; which are the same trespasses in the said declaration mentioned, and whereof the said plaintiff hath above thereof complained against the said defendant. And the said defendant further saith, that after the committing of the said several trespasses, and before the day of the exhibiting of the bill of the said plaintiff in this behalf, (or, *if in C. P. or by original*, "before the commencement of this suit,") to wit, on, &c. (*day of tender or about it*) at, &c. (*venue*) aforesaid, the said defendant tendered and offered to pay the said plaintiff the said sum of £—, of lawful money

(o) See precedents, 9 Wentw. Index, cxxxii. In trespass to land this plea is given by the 21 Jac. 1, c. 16, s. 5. See the cases thereon, Com. Dig. Pleader, 8 M. 86—Vin. Ab. Trespass, §. a 542. Bac. Ab. Tender, P. 8. It

should seem that a tender of amends cannot be pleaded for any other trespasses than those committed by cattle, see 3 Lev. 87.—Stra. 686 and Vin. Ab. Trespass, §. a 542.

of Great Britain, in full satisfaction of the said several trespasses in the said declaration mentioned, the said sum of £— then and there being sufficient amends for the said trespasses, which said sum of money the said plaintiff then and there wholly refused, and still doth refuse to accept of the said defendant. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

IN  
GENERAL.

[*First plea, general issue, as ante, 1061.*]—And for a further plea in this behalf, as to the said supposed trespasses in the said declaration mentioned, and the said defendant by leave of the court here, for this purpose first had and obtained, according to the form of the Statute in that case made and provided, saith, that the said plaintiff ought not to have or maintain his aforesaid action thereof against him; because he saith, that he the said defendant was not guilty of the said several supposed trespasses in the said declaration mentioned, or of any or either of them, or of any part thereof, in manner and form as the said plaintiff hath above thereof complained against him, at any time within six, (or, *in an action of trespass to the person* “four”) years, next before the exhibiting of the bill of the said plaintiff against the said defendant in this behalf, or, *if in C. P. or by original*, “next before the commencement of this suit.” And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

Statute of  
limitations  
(p).C. D. )  
ats.

[*First plea general issue, as ante, 1061.*]—And for a further A. B. ) plea in this behalf, [as to the said assaulting, beating, bruising, wounding (r), and ill-treating the \*said plaintiff, as to the said first count of the said declaration mentioned, and as to the rending, tearing, damaging, and spoiling the wearing apparel of the said plaintiff, as in that

TO  
PERSONS.  
Son assault  
demeine  
(q).  
[\*1068]

(p) 21 Jac. 1, c. 16, s. 8. See observations on this statute, 6 East, 390.—1 Chit. Col. Stat. 700. An acknowledgment of a trespass not committed within six years, will not take the case out of the statute, 1 B. & A. 92.—2 Chit. Rep. 249.

(q) As to this plea, see Com. Dig. Pleader, 8 M. 15, and the precedents, 9 Wentw. Index, mod. to cxxiii.—1 Rich. C. P. 150.—2 Id. 28.—Plead. Ass. 447.—Term. 269, 270. Unless it be quite certain that the evidence will support this plea, it is not advisable to adopt it, particularly in actions for trifling assaults, because if *son assault* be pleaded unsuccessfully, the battery being admitted on the record, the plaintiff will be entitled to full costs, though the damages be under forty shillings, unless the judge certify, under the statute of Elizabeth, that the action was frivolous, 6 T. R. 82.—3 T. R. 391; but see 1 Taunt. 16.

(r) The statement of the trespasses in the introductory part of the plea will necessarily depend upon the form of the declaration, and in many cases it must be wholly unnecessary. In a plea of *son assault demeine* a wounding may be justified in self-defense in the above form; but where the law *prima facie* only authorizes an arrest, or touching a person by *molliter manus imposuit*, if a wounding also be attempted to be justified, the occasion thereof must be specially stated, as in the case

of an arrest under process a resistance or attempt to rescue must be stated, as in 1 Saund. 296, 7.—Id. note 1.—8 T. R. 78, 299. In defence of the person of the defendant an assault and battery, &c. may be justified (2 Salk. 649.—1 Ld. Raym. 177.—Bul. N. P. 7th ed. 18.—7 Moore, 35,) but in defence of the possession of personal or real property, the defendant must plead *molliter manus imposuit*, see the distinction, 1 Salk. 407.—Lutw. 1483.—8 T. R. 78.—Com. Dig. Pleader; 8 M. 15. It seems clear the defendant cannot in any case justify an actual *beating* and *wounding*, unless he shows in his plea that force was used or attempted on the part of the plaintiff, but still he may justify the *beating*, that is to say, what in law amounts to a *battery*, by way of *molliter manus imposuit*, for it was held in 6 T. R. 562, that a justification of “assaulting, seizing, and grasping the plaintiff,” in a vestry-room, amounted to a justification of a *battery* within the meaning of 22 & 23 Car. 2 c. 9, as to costs. So also in 7 Taunt. 689. 1 Moore, 420, S. C. a justification of ill-treating by way of *molliter manus imposuit* admitted a *battery*, and see Willes, 14; and see 1 Saund. 6th ed. by Patterson & Williams. 296, (a). How to reply to such plea, see Carth. 280.—1 Salk. 407.—Skin. 887; and see 2 Bla. Rep. 1165.

TO  
PERSONS.  
Plaintiff's  
first as-  
sault.  
Defend-  
ant's self-  
defense.

count also mentioned] the said defendant by leave of the court here for that purpose first had and obtained, according to the form of the Statute in that case made and provided, saith, that the said plaintiff ought not to have or maintain his aforesaid action thereof against him\*, because he says, that the said plaintiff just before the said time when, &c. [in the said first count mentioned] to wit, on the day and year in that count mentioned, at, &c. (*venue*) aforesaid, with force and arms, &c. made an assault (s) upon the said defendant, and would then and there have beat, bruised, and ill-treated the said defendant, if he had not immediately defended himself against the said plaintiff; wherefore he the said defendant did then and there defend himself against the said plaintiff, as he lawfully might for the cause aforesaid, and in so doing did necessarily and unavoidably (t) as little beat, bruise, wound, and ill-treat the said plaintiff, and rend, tear, damage, and spoil the said wearing apparel in the said first count mentioned,] *doing no unnecessary damage to the said plaintiff on the occasion aforesaid*; [and so the said defendant saith, that if any hurt or damage then and there happened to the said plaintiff, or his said wearing apparel, the same was occasioned by the said assault so made by the said plaintiff on him the said defendant, and in the necessary defense of himself the said defendant against the said plaintiff;] which are the same supposed trespasses in the introductory part of the plea mentioned, and whereof the said plaintiff hath above complained against him the said defendant. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

Molliter  
manus im-  
posuit, to  
preserve  
the peace,  
whereupon  
plaintiff  
made an  
assault on  
defendant,  
who de-  
fended  
himself  
(w).

[\*1070]

[*First plea, general issue, as ante, 1061; second plea, son assault demesne, as ante, 1067; third plea, as follows:*]—And for a further plea in this behalf, [as to the said assaulting, beating, bruising, wounding, and ill-treating the said plaintiff, as in the said first count of the said declaration mentioned (u),] the said defendant by like leave of the court here for this purpose first had and obtained, according to the form of the Statute in that case made and provided, saith, that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he saith that—[*Here state the molliter manus imposuit to preserve the peace, as in the form, post, 1071, to the †, and then proceed as follows:*]—Whereupon the said plaintiff then and there with force and arms, &c. made an assault upon the said defendant, and would then and there have beat, bruised, and ill-treated him the said defendant, if, &c.—[*State the self-defense, &c. and conclude as in the above form.*]

(s) State the assault or battery, &c. made by the plaintiff upon the defendant, according to the facts.

(t) This, together with the averment that the trespasses are the same as those complained of in the declaration, according to many of the entries, do not appear to be necessary, see the precedents, Winch, 1121.—Co. Ent. 644.—2 Saund. 5, which merely state that the supposed injury was occasioned by the plaintiff's first assault, and in self-defense, and conclude with a verification. It should seem that it would suffice to say, "and in so doing did commit the said supposed trespasses in the

said declaration or said count mentioned;" or "in the introductory part of this plea mentioned."

(u) This enumeration of the trespasses intended to be justified must depend upon the statement in the declaration, and in many cases it may be wholly unnecessary.

(w) See the notes to the form, ante, 1067, 8. The plea of *son assault demesne* might, in such case, be insufficient, because the defendant's first interference to preserve the peace would, in point of fact, render him the first assaulter, though justifiably so.



[*First plea, general issue, as ante, 1061; second plea, as in the form, ante, 1067, 8, to the asterisk, and then as follows:*]—Because he saith, that the said plaintiff, just before the said time when, &c. in the said [first count mentioned,] to wit, on the same day and year in that count mentioned, at, &c. (*venue*) aforesaid, with force and arms, &c. made an assault upon E. F. then and there being the [father] of the said defendant, and would (y) then and there have beat, bruised, and ill-treated him the said E. F. if he the said defendant had not immediately defended the said E. F. wherefore he the said defendant did then and there defend the said E. F. so then and there being his [father] as aforesaid, against the said plaintiff, as he lawfully might for the cause aforesaid, and in so doing did necessarily and unavoidably [a little beat, bruise, wound, and ill-treat the said plaintiff, and rend, tear, damage, and spoil the said wearing apparel in the said first count mentioned (z),] doing no unnecessary damage to the said plaintiff, on the occasion aforesaid; and so the said defendant says, that if any hurt or damage then and there happened to the said plaintiff, or his said wearing apparel, the same was occasioned by the said assault so made by the said plaintiff, upon the said E. F. in the necessary defense of the said E. F. against the said plaintiff. Which are the same supposed trespasses in the introductory part of this plea mentioned, and whereof the said plaintiff hath above thereof complained against the said defendant. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

TO  
PERSONS.  
Son assault  
in defense  
of a father,  
&c. (x).

[*First plea, general issue, as ante, 1061; second plea, as follows:*] [\*1071]  
—And for a further plea in this behalf, [as to the said assaulting, beating and ill-treating the said plaintiff, as in the said first count mentioned (b),] the said defendant, by leave of the court here, for this purpose first had and obtained, according to the form of the Statute in that case made and provided, says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him\*, because he says, that the said plaintiff, and one E. F. at the said time when, &c. at, &c. (*venue*) aforesaid, were fighting together, and striving with force and arms to beat and wound each other, against the peace of our lord the now king; whereupon the said defendant being then and there present, for the preservation of the peace of our said lord the king, and that the said plaintiff, and E. F. might do no hurt to each other, and in order to separate and part them, then and there gently laid his hands upon the said plaintiff, as he lawfully might for the cause aforesaid†, which are the said [assaulting, beating, and ill-treating, the said plaintiff, in the first count of the said declaration mentioned (c),] and whereof he the said plaintiff hath above thereof complained against him the said defendant. And this, &c.  
—[*Conclude with a verification, as ante, 907, sixth form.*]

Molliter  
manus to  
preserve  
the peace,  
plaintiff  
and a third  
person be-  
ing fight-  
ing togeth-  
er (a).

(z) As to the pleas of this nature, see Com. Dig. Pleader, 3 M. 15.—1 Burn, J., "*Assault*." By inserting the words "wife," "mother," "son," "daughter," "servant," or "master," according to the fact, instead of the word "father," this form may be readily applied to any case that may arise. See precedents, Winch. Ent. 1121.—9 Wentw. Ent. cxi. to cxliii.

(y) 2 Stra. 953.

(s) Or, instead of these words say, commit the said several supposed trespasses in the introductory part of this plea, and the said de-

claration mentioned."

(a) See the notes to the precedent, ante, 1069. As to this plea, see Com. Dig. Pleader, 3 M. 16, and the forms, 2 Bro Ent. 187.—2 Rich. C. P. 56.—9 Wentw. Index, cxviii.

(b) This enumeration of the trespasses intended to be justified, must depend on the statements in the declaration, and in some cases may be wholly unnecessary.

(c) Or, instead of these words, say "supposed trespasses in the introductory part of this plea, and in the said declaration mentioned."

TO  
PERSONS.  
The like  
stating  
that the  
plaintiff  
made an  
assault up-  
on a third  
person (d).

[*First plea, general issue, as ante, 1061; second plea, same as above, to the asterisk, and then as follows:*—Because he says, that the said plaintiff, just before the said time when, &c. [in the said first count mentioned,] to wit, on the day and year in that count mentioned, with force and arms, &c. had made an assault upon one E. F. and was then and there, and at the same time when, beating and ill-treating the said E. F. in breach of the peace of our said lord the king; wherefore the said defendant, at the said time when, &c. to preserve the peace of our said lord the king, and to part the said plaintiff from, and to prevent him from further beating and ill-treating the said E. F. gently laid his hands upon the said plaintiff, as he lawfully might for the cause aforesaid†, which are the same [assaulting, beating, and ill-treating the said plaintiff, in the said \*first count of the said declaration mentioned (e),] and whereof the said plaintiff hath above thereof complained against the said defendant. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

[\*1072]

Correction  
of an ap-  
prentice  
for disobe-  
dience (f).

[*First plea, general issue, as ante, 1061; second plea, as to the assaulting, beating, and ill-treating, the said A. B. actio non, by leave, &c. as ante, 1071.*—Because he says, that before and at the said time when, &c. in the said [first count] mentioned, to wit, at, &c. (venue) aforesaid, the said plaintiff was the apprentice of the said defendant, in his trade and business of a — and then and there behaved and conducted himself saucily and contumaciously towards the said defendant, and then and there refused to obey his lawful commands relating to his duty as such apprentice as aforesaid, whereupon he the said defendant then and there moderately corrected him the said plaintiff, for his said misbehavior. Which are the said assaulting, beating, and ill-treating the said plaintiff, in the said [first count] mentioned. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

Moderate  
correction  
of a sea-  
man (g).

[*First plea, general issue, as ante, 1061; second plea, as follows:*—And for a further plea in this behalf, [as to the making of the said assault on the said plaintiff, in the said first count of the said declaration mentioned, and beating, bruising, and ill-treating him, and putting the said iron shackles upon the hands of the said plaintiff, and imprisoning him for the space of time in the said first count mentioned (h),] \*the said defendant saith, [*actio non, by leave, &c. as ante, 1071.*] because he saith, that he the said defendant, before and at the said time when, &c. in the said first count mentioned, was the master and commander of a certain ship or vessel called the — and the said plaintiff then was a mariner in and belong-

[\*1073]

(d) See the note to the preceding form.

(e) Or, instead of these words say, "supposed trespasses in the introductory part of this plea, and in the said declaration mentioned."

(f) As to this plea, see Com. Dig. Plead-er, 3 M. 19.—1 Bla. Com. 450.—Burn, J. "Apprentice." See the forms, Bro. Ent. 219. See the necessity for pleading this matter specially, 2 B. & P. 224.

(g) As to the necessity for pleading this ground of defense specially, see 2 B. & P. 224. It may be frequently advisable to plead the facts more specially, see the form, 9 Wentw 355

—2 Rich. C. P. 47, 51.—As to pleas of moderate correction in general, see Com. Dig. Plead-er, 3 M. 19. The Mutiny Acts allow a defense in this nature, in the case of disobedience of a soldier, &c. to be given in evidence under the general issue. In such a case, if the plaintiff were found guilty of disobedience by a court-martial and the defendant relies on it in his defense as a matter of estoppel, he should plead it specially, see 2 C. & P. 148.

(h) This enumeration of the trespasses intended to be justified, must depend on the statement in the declaration, and in many cases is wholly unnecessary.

ing to the said ship or vessel, and the said defendant further saith, that the said plaintiff, just before the said time when, &c. in the said [first count] mentioned, neglected his duty as such mariner as aforesaid, in and on board of the said ship or vessel, and behaved and conducted himself in a mutinous, disorderly, and improper manner, on board thereof; whereupon the said defendant, so being master and commander of the said ship or vessel as aforesaid, for the preservation of discipline and order in and on board thereof, at the said first time when, &c. did moderately chastise and correct the said plaintiff, for his said neglect of duty and misconduct, and in so doing did necessarily and unavoidably [a little beat, bruise, and treat the said plaintiff; and for the same purpose he, the said defendant, did then and there put the said iron shackles upon the hands of the said plaintiff, and did imprison him for the space of time in the said first count mentioned, as it was lawful for him to do for the cause aforesaid, which are the same supposed trespasses in the introductory part of this plea mentioned (i),] and whereof the said plaintiff hath above thereof complained against the said defendant. And this, &c.—[Conclude with verification, as ante, 907, sixth form.]

TO  
PERSONS.

[First plea, general issue, as ante, 1061.]—And for a further plea in behalf as to the [confine the commencement to the trespasses mentioned in the declaration intended to be justified, if all are not so,] said several trespasses in the said [first count of the said] declaration mentioned, except as to the rending, tearing, and damaging the clothes and wearing apparel therein mentioned] the said defendant, by leave of the court here, for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says, that the said several supposed trespasses in the said [first count of the said] declaration mentioned, were committed after the passing and commencement of a certain act of parliament made and passed in the 9th year of the reign of his late Majesty King George the Fourth, entitled "An Act for consolidating and amending the Statutes in England relating to Offences against the Person;" and that such offences amounted to more than a common assault and battery within the meaning of that act, and that after the commission of such trespasses, to wit, on the day of the year aforesaid, in the county aforesaid, the said defendant, upon the complaint of the said plaintiff before then made by him of the said trespasses, according to the said Statute, the said defendant was brought before J. D., Esq. and S. P., Esq. then and there being justices of our lord the king, assigned to keep the peace of our said lord the king in and for the said county of Kent, and to hear and determine misdemeanors there committed, and was by them the said justices, so being such justices, the prosecution and at the instance of the said plaintiff, convicted of the said trespasses in the said first count mentioned, except as aforesaid, by them adjudged for such trespasses to forfeit and pay a certain fine sum of money, to wit, the sum of 2s. 6d. of lawful money of Great Britain, to be paid by him to E. F. and to be by him applied according to the directions of the Statute in that case made and provided; and the

To a declaration for assault and battery, that defendant was convicted of the same before two justices, under the 9 Geo. 4, c. 81, ss. 27, 28, and therefore defendant released from action (k).

Or, instead of these words between the lines, say, "commit the said supposed trespasses in the introductory part of this plea mentioned, and in the said declaration men-

tioned."

(k) See the clauses and notes, Burn, J. 26th ed. "Assault."

TO  
PERSONS.

said defendant was also then and there in the preceding matter aforesaid, by the said justices, adjudged to pay the sum of — shillings for costs, and that the same should be paid to the said plaintiff; and the said defendant did afterwards, to wit, on the day and year aforesaid, in the county aforesaid, pay the whole amount of the monies so adjudged to be paid as aforesaid, and according to that adjudication, whereby and by force of the said statute, the said defendant then and there became, and still is, released from this action, so far as relates to the said trespasses in the introductory part of this plea mentioned, and this the said defendant is ready to verify; wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

DEFENSE OF  
POSSESSION.

That plaintiff was unlawfully in defendant's dwelling-house, and *molliter manus imposuit* to turn him out (k).

[\*1074]

[*First plea, general issue as ante, 1080; second, plea as follows:*]—And for a further plea in this behalf, [as to the assaulting, beating (l), and ill-treating the said plaintiff, as in the said first count mentioned,] the said defendant [*by leave, &c. actio non, as ante, 906, 7,*] because he says, that the said defendant, before and at the said time when, &c. was lawfully possessed (m) of a certain dwelling-house, with the appurtenances, situate and being at —; and being so possessed thereof, the said plaintiff, just before the said time when, &c. to wit, on the same day and year in the said declaration mentioned, was unlawfully in the said dwelling house, and with force and arms making a great noise and disturbance therein, and at the said time when, &c. staid and continued therein making such noise and disturbance, without the leave or license, and against the will of the said defendant, and during all that time there greatly disturbed and disquieted the said defendant and his family in the peaceable and quiet possession and enjoyment of his said dwelling-house; and thereupon the said defendant then and there requested (n) the said plaintiff to cease making his said noise and disturbance, and to go and depart from and out of the said dwelling-house, which the said plaintiff then and there wholly refused to do, whereupon the said defendant, in defense of the possession of his said dwelling-house, at the said time when, &c. gently laid his hands upon the said plaintiff in order to remove, and did then and there remove the said plaintiff from and out of the said dwelling-house, as he lawfully might for the cause aforesaid †, which are the said supposed trespasses in the introductory part of this plea mentioned, and whereof the said plaintiff hath complained against the said defendant; without this, that (o) he the said defendant was guilty of the said supposed trespasses, or any or either of them, elsewhere than in the said dwelling-house situate as aforesaid (p).—[*Conclude with a verification, as ante, 907, sixth-form.*]

(k) As to this plea, see ante, 1067, note g.—See Com. Dig. Pleader, 8 M. 16, 17, and the forms, 8 T. R. 299, 78.—8 Wentw. 116.—2 Rich. C. P. 59.—Plead A. 495, 6.

(l) A wounding cannot be justified merely in defense of possession, (8 T. R. 299.—Com. Dig. Pleader, 8 M. 16, 17.—1 Salk. 407.—Lutw. 1488.)—Though if the plaintiff attempted to enter the house with force it is otherwise, see the law and precedent, 8 T. R. 78. If the plaintiff, upon the attempt to remove him, resisted, and was guilty of an assault upon the defendant or his family, and the defendant did actually beat or wound him in self-defense, those acts may be justified, 8 T. R. 299. stating at the †, in the above form, the

assault by the plaintiff, and the defendant's self-defense, as in the form, ante, 1069, and post, 1074.

(m) This is sufficient, 8 Wils. 71, 78. 8 T. R. 299.

(n) As to this request, see 1 C. & P. 6.—8 T. R. 299, 78.

(o) As to this allegation, see 1 Saund. 78, 80, n. 3.

(p) As to this averment, see ante, vol. i. Index, "*Quæ est eadem.*" &c. 2 Stra. 694.—2 Saund. 5, n. 3.—1 Saund. 81, n. 3; 85, 298, and see the forms, Cowp. 162, 171.—2 Bro. Ent. 189. When the house is in the same parish or place as stated in the declaration, this averment is to be omitted.

[*Actio non, as ante, 906.*]—Because he says, that he the said defendant, long before and at the said time when, &c. was lawfully possessed of a certain public-house, situate at, &c. aforesaid. And the said plaintiff a little before the said time when, &c. entered and came into the said house of the said defendant, and then and there made a great noise and disturbance therein, and the said plaintiff then and there behaved and conducted himself in a rude, quarrelsome, and uncivil manner towards divers persons then and there lawfully being in the said house, and thereby then and there greatly disturbed and disquieted the said defendant and his family, and the said other persons so being in the said house, in the peaceable and quiet occupation, and enjoyment thereof; whereupon the said defendant then and there requested, &c.—[*Same as in the last preceding form to the end.*]

TO  
PERSONS.  
DEFENSE OF  
POSSESSION.  
The like of  
a public  
house.

[*First plea, general issue, as ante, 1061; second plea, as follows:*—] And for a further plea in this behalf [as to the assaulting, beating, and striking the said plaintiff with a stick, as in the said first count of the said declaration mentioned (*r*) the said defendant, &c. [*by leave, &c. actio non, as ante, 907;*] because he says, that he the said defendant before and at the said time when, &c. in the said [first count of the said] declaration mentioned, was lawfully possessed of and in a certain messuage or dwelling-house, situate at, &c. in which he the said defendant did then and there inhabit and dwell, and that he the said defendant, being so possessed thereof, the said plaintiff, just before the said time when, &c. to wit, on the same day and year aforesaid, to wit, at, &c. (*venue*) aforesaid, with force and arms, and with a strong hand (*s*), did attempt and endeavor forcibly to break into and enter the said messuage or dwelling-house of the said defendant, without the leave or license, and against the will of the said defendant, whereupon the said defendant, at the said time when, &c. being in the said messuage or dwelling-house, in order to preserve the peaceable and quiet possession thereof, did then and there resist and oppose such entrance of the said plaintiff into his said messuage or dwelling-house, and in so doing did necessarily and unavoidably commit the said several supposed trespasses in the introductory part of this plea, and in the said declaration mentioned, and as he lawfully might for the cause aforesaid; and so the said defendant in fact saith, that if any damage or injury then and there happened to the said plaintiff, it was occasioned by the said defendant's said defense of his said possession of his said messuage or dwelling-house, against the said plaintiff, which are, &c.—[*Conclude as in the form, ante, 1074, from the †, with a verification, as ante, 907.*]

[\*1075]  
The like in  
resistance  
of plain-  
tiff's entry  
into defen-  
dant's  
dwelling-  
house (*q*).

[*First plea, general issue, as ante, 1061; second plea, as follows:*—] And for a further plea in this behalf, [as to the said assaulting of the said plaintiff in the said first count mentioned, and beating and ill-treating him therein mentioned (*u*),] the said defendant, by leave of the court here, for this purpose first had and obtained, according to the form of the statute

Defense of  
possession  
of a close  
(*t*).

(*q*) See the form, 8 T. R. 78; and the notes to the form, ante, 1073; 1068, note.

(*r*) This enumeration of the trespasses intended to be justified, must depend on the statements in the declaration, and in many cases is unnecessary.

(*s*) A forcible attempt to enter will justify a

battery and wounding, 8 T. R. 78.

(*t*) As to this plea, see 8 T. R. 78, and ante, 1073, n. i.

(*u*) This enumeration of the trespasses intended to be justified, must depend on the statements in the declaration, and in many cases is wholly unnecessary.

TO  
PERSONS.  
  
DEFENSE OF  
POSSESSION.

in that case made and provided, saith that "the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that he the said defendant, before and at the said time when, &c. was lawfully possessed of and in a certain close, to wit, a close called — [or abutting, &c. *setting out the abutments, as pointed out, ante*, 868,] in the parish of — in the county aforesaid, [and of a certain gate of and belonging to the same close,] and being so possessed, the said plaintiff, a little before the said time when, &c. with force and arms, and with a strong hand, and without the license or permission, and against the will of the said defendant, did force and break open [the said gate,] and as much as in him the said plaintiff lay, did attempt and endeavor forcibly to break into and enter the said close of the said defendant, [and forcibly to drive into the said close a great number, to wit, — sheep of the said plaintiff (w)], and would then and there unlawfully and forcibly, with a strong hand, have affected and accomplished such unlawful attempt and endeavor, without the license or permission of the said defendant, and against his will; if the said defendant had not defended his said possession of his said close [and gate] whereupon the said defendant, being then in his said close, and during the said forcible and wrongful attempt and endeavor of the said plaintiff, did, at the said time when, &c. defend his the said defendant's possession of his said close [and gate] and oppose and resist the said attempt and endeavor of the said plaintiff, as it was lawful for him the said defendant to do on the occasion aforesaid: And the said defendant further saith, that if any damage or injury then and there happened to the said plaintiff, the same happened of the wrong of the said plaintiff, and in the defense by the said defendant of his said close [and gate]; without this he the said defendant was guilty of the said several trespasses in this plea mentioned, or any of them, at, &c. (*vénue*) aforesaid, or elsewhere, or in any other manner than as in this plea mentioned (x). And this, &c.—[*Conclude with a verification, as ante*, 907, *sixth form*.]

IMPRISON-  
MENT WITH  
OUT PRO-  
CESS. (y).

Plea by two defendants to a declaration for assault and imprisonment, that plaintiff committed a breach of the peace in the house of one of them, and that the other defendant as a constable apprehended plaintiff, and carried him before a magistrate (z.)

[*First plea, general issue, as ante*, 1061, *second plea as follows*.:]—

And for a further plea in this behalf, [as to the assaulting, beating, and ill-treating of the said plaintiff as in the said first count of the said declaration mentioned, and compelling him to get into the said cart in the said first count mentioned, and to go and travel therein the distance in the first count mentioned, and as to the imprisoning the said plaintiff, and keeping

(w) These averments must correspond with the facts.

(x) As to this averment, see *ante*, 1074, n. p.

(y) See a precedent of a justification, by a sheriff at an election, 1 Taunt. 146.

(z) As to pleas of this description, see Com. Dig. Pleader, 8 M. 22, and the precedents, 9 Wentw. Index, ciii. A peace officer acting by virtue of his office, need not join in the plea, but may plead the general issue, and give the special matter in evidence, 7 Jac. 1, c. 6, and 21 Jac. 1, c. 12.—See Burn, J. 26th ed. "*Constable*."—1 Stra. 446.—9 B. & Cres. 816. It may, however, frequently be advisable for such officer to join in the plea, in order to narrow the evidence on the trial, especially when he acted under a warrant, in

which case the general replication *de injuria* would be insufficient; sometimes, however, it is best for him not to join in the plea, see 2 Bing. 528. Where a party merely acts in the aid, and assistance of the officer, he may defend under the general issue, 8 Campb. 287; but not so if he acts as the prime mover and principal in the transaction, 2 Stark. 446; Holt, C. N. P. 478, and a private individual who makes the charge, and puts the constable in motion, cannot justify under the general issue; he must plead the special circumstance by way of justification, Holt, C. N. P. 478. See precedents for pleas justifying the removal of the plaintiff out of church for making disturbance in it, 4 D. & R. 217.—2 B. & C. 696. S. C.

and detaining him in prison for "the said time in the said first count mentioned (a),] the said defendants, by leave of the court here for this purpose first had and obtained, according to the form of the Statute in such case made and provided, say, that the said plaintiff ought not to have or maintain his aforesaid action thereof against them, because they say, that before and at the time when, &c. in the said first count mentioned, the said C. D. was lawfully possessed of a certain dwelling-house, situate at — and the said C. D. being so possessed thereof, the said plaintiff, just before the said time when, &c. to wit, on, &c. in the said declaration mentioned, at, &c. (*venue*) aforesaid, entered and came into the said dwelling-house, and then and there, with force and arms made a great noise, disturbance, and affray therein, and then and there insulted, abused, and ill-treated the said C. D. and his family, in the said dwelling-house, and greatly disturbed and disquieted them in the peaceable and quiet possession of the said dwelling-house, in breach of the peace of our said lord the king; whereupon the said C. D. then and there requested the said plaintiff to cease his said noise and disturbance, and to depart from and out of the said house, which he the said plaintiff then and there wholly refused to do, and continued in the said house making the said noise, disturbance and affray therein, and then "and there threatened the said C. D. and his family, that he would continue making his said noise and disturbance in the said house during the whole night, and hinder and prevent the said C. D. and his family from sleeping or enjoying any quiet or repose in the said house, whereupon the said C. D. in order to preserve the peace, and restore good order and tranquillity in his said house, then and there gave charge of the said plaintiff to the said E. F. then and there being a constable of the — (b) *who then and there saw and had view (c) of the said breach of the peace*, so committed by the said plaintiff as aforesaid, and then and there requested the said E. F. so being such constable as aforesaid, to take the said plaintiff into his custody, and carry him before some justice or justices of our said lord the king, assigned to keep the peace in and for the said county of — to answer the premises, and to be dealt with according to law, and the said E. F. so being such constable as aforesaid, at such request of the said C. D. then and there gently laid his hands on the said plaintiff for the cause aforesaid, and did then and there take the said plaintiff into his custody, and did carry and conduct the said plaintiff from and out of the said house (d), in order to

TO  
PERSONS.  
—  
IMPRISON-  
MENT  
WITHOUT  
PROCESS.

The plaintiff's  
breach of  
the peace.

Request on  
him to  
cease it;  
and his re-  
fusal.

[\*1078]

Plaintiff  
given in  
charge to a  
constable.

Who mol-  
titer manus  
imposuit.

(a) This enumeration of the trespasses intended to be justified, must depend on the allegations in the declaration, and is in many cases wholly unnecessary.

(b) Take care that this appointment be properly described; he must be appointed for a township, &c. and not for a parish, 7 East, 378. Who is not an authorised officer, 5 Esp. 82.—Burn, J. 26th edit. "*Constable*."

(c) In a plea justifying an imprisonment by a constable not under a warrant, it seems necessary in general to aver, that the constable had view of the breach of the peace, for it has been decided that a constable cannot arrest for an affray out of his view without a warrant, except felony is likely to ensue, Cro. Eliz. 875. —2 Esp. Rep. 540.—8 Hawk. Pl. Cr. 174, 184; Book 2, c. 13, s. 8.—1 Esp. Rep. 294.—

Holt, C. N. P. 478.—R. & M. C. C. 132.—Burn, J. "*Arrest*;" but see 2 Hale, 90.—3 Camp. 420, and as to these pleas in general, see 1 Chit. Crim. Law, 28. There are precedents, however, omitting such statement, 9 Wentw. 27, 344, 5; and in a case, where the disturbance had been made in a house late at night, and the plaintiff would not go out, but was not guilty of a breach of the peace within the view of the constable, a very able Pleader advised a special plea, omitting the above statement, considering that a practice contrary to the above decisions had so long prevailed, and was so necessary for the maintenance of a proper police, that probably a different decision might not now take place.

(d) This and the subsequent averments must correspond with the facts.

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PERSONS.  
—  
IMPRISON-  
MENT  
WITHOUT  
PROCESS.

And be-  
cause it  
was too  
late at  
night the  
constable  
kept him  
in custody.  
No magis-  
trate to be  
found in  
the way

On plain-  
tiff's sub-  
mission  
and re-  
quest, de-  
fendants  
suffered  
him to go  
at large.

carry and convey him before such justice as aforesaid, to be there dealt with according to law for his said offence and breach of the peace, to wit, at, &c. (*venue*) aforesaid; and because it was then and there late at night (*e*), and an unseasonable time for the said E. F. to carry the said plaintiff before such justice as aforesaid, he the said E. F. so being such constable as aforesaid, for that reason and for the cause aforesaid, necessarily and unavoidably imprisoned the said plaintiff, and kept and detained him in a certain prison in the parish aforesaid, called the — until the next morning; and the said defendants further say, that on the next morning as soon as conveniently could be, he the said E. F. so being such constable as aforesaid, endeavored to carry and convey the said plaintiff before such justice as aforesaid, to answer the said premises, and to be dealt with according to law, and because no justice as aforesaid could be found near to the said prison, and because it was then and there expedient and necessary that the said plaintiff should go, proceed, and be carried in the said cart before such justice as aforesaid, for the purpose aforesaid, and because the said plaintiff then and there refused to get into such cart for the purpose aforesaid, he the said E. F. so being such constable as aforesaid, and the said C. D. in his aid and assistance, and at his request, did gently lay their hands upon the said plaintiff, and did then and there gently force and compel the said plaintiff to get into the said cart, and to go and travel therein the said distance in the said declaration mentioned, in order that he the said plaintiff might be carried and conveyed by the said E. F. so being such constable as aforesaid, before such justice as aforesaid, to answer the premises, and be there dealt with according to law, for his said offence and breach of the peace. And the said defendants further say, that afterwards, and while the said E. F. so being such constable as aforesaid, was so carrying and conveying the said plaintiff before such justice as aforesaid, to wit, on, &c. aforesaid, at, &c. (*venue*) aforesaid, he the said E. F. at the special solicitation and request of the said plaintiff, upon his making a reasonable and proper submission for the said offence, and with the consent of the said plaintiff, discharged the said plaintiff from and out of his said custody, and then and there permitted him to go at large, without carrying him before such justice as aforesaid (*f*), as they the said defendant and E. F. lawfully might for the cause aforesaid, which are the same supposed trespasses in the introductory part of this plea mentioned, and whereof the said plaintiff hath above thereof complained against the said defendants (*g*).—And this, &c.—  
[Conclude with a verification, as ante, 907, sixth form.]

[1080]

The like in  
a more  
concise  
form, by  
the private  
person on-  
ly (*h*).

[\*First plea, general issue, as ante, 1061; second plea, as follows:]  
—And for a further plea in this behalf, [as to the making the said assault upon the said plaintiff in the said first count of the said declaration mentioned, and imprisoning him, and keeping and detaining him in prison for a part of the said time in the said first count mentioned, to wit, for the space of eight hours, part of the time in that count mentioned,] the said defendant by leave of the court here, for this purpose first had and obtained, according to the form of the Statute in that case made and provided,

(e) This and the subsequent averments must correspond with the facts.

(f) This statement of defendant's release is to be according to the fact; *quære* the sufficiency of this statement, 5 East, 298.—3 Hawk. P. C. 174 It should seem it is justifi-

able in a case of mere affray or breach of the peace, *Id.* and see 3 C. & P. 397.

(g) It may be necessary in some cases to insert the averment, *ante*, 1074, note.

(h) See the notes to the former precedent.



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MENT  
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says, that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says, that just before the said time when, &c. in the said first count mentioned, to wit, on the same day and year aforesaid, at, &c. (*venue*) aforesaid, the said plaintiff with force and arms, &c. made an assault upon the said defendant, and beat and ill-treated him, and thereupon the said defendant then and there gave charge of the said plaintiff to a certain peace-officer of our said lord the king, to wit, one E. F. who then and there had view of the said breach of the peace of our said lord the king, so committed by the said plaintiff as aforesaid, and requested the said peace-officer to take the said plaintiff into his custody, and carry him before some justice or justices of our said lord the king, assigned to keep the peace in and for the said county of — to answer the premises, and to be examined and dealt with according to law; and the said peace-officer, at such request of the said defendant, and the said defendant in the aid and assistance of the said peace-officer, then and there gently laid their hands upon the said plaintiff, in order to take, and did then and there take the said plaintiff into the custody of such peace-officer, and kept and detained him so in custody until the said plaintiff afterwards, and as soon as conveniently could be, was carried before one of his majesty's justices assigned to keep the peace in and for the said county of — for examination concerning the premises, and to be dealt with according to law, and on that occasion the said plaintiff was necessarily and unavoidably imprisoned, and kept and detained in prison for the said space of time in the introductory part of this plea mentioned, as he lawfully might for the cause aforesaid; which are the same supposed trespasses in the introductory part of this plea mentioned, and whereof the said plaintiff hath above thereof complained against him the said defendant. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

[*Actio non, as ante, 906; and if only part of the trespass, as stated in the declaration, can be justified, then confine the commencement of the plea accordingly.*—Because he says, that the said plaintiff, before the commission of the said supposed trespasses in the said declaration mentioned, to wit, on, &c. (*day of the felony, or about it,*) at, &c. (*venue*) [*here state the offence committed by the plaintiff in substance, as you would state it in an indictment, as thus:*—[being then and there employed as a clerk to the said defendant, did, by virtue of such his employment, then and there, and whilst he was so employed as aforesaid, receive and take into his possession certain money, to a large amount, to wit, to the amount of [£100,] [or, goods and chattels, to wit, &c. as the case was,] for and in the name and on the account of the said defendant his master, as aforesaid, and the said money [or, goods and chattels,] then and there fraudulently and feloniously did embezzle. And the said defendant further saith, that the said plaintiff then and there, in manner and form as aforesaid, the said last-mentioned money [or, goods and chattels,] the property of the said defendant his master as aforesaid, from the said defendant feloniously did steal, take and carry away, against the form of the Statute in

Plea, justifying imprisoning plaintiff, and taking him before a magistrate, he having been guilty of a felony on 7 & 8 Geo. 4. c. 29, s. 47, as a clerk, in embezzlement of defendants' property (i).

(i) The plea may be readily adapted to a case where plaintiff has been guilty of any other felony or misdemeanor. In order to justify a private person in arresting another for felony, it is absolutely requisite that a felony

should have been committed by some one. If committed by plaintiff the above plea will be correct, but if committed by some other person, and plaintiff be suspected of it, then the plea should be as post, 1081.

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that case made and provided, and against the peace of our lord the king;] wherefore the said defendant did, at the said time when, &c. in the said declaration mentioned, gently lay his hands on the said plaintiff, and [if the defendant gave plaintiff in charge of a constable, then state the fact, and as between the inverted commas, thus:] "did give the said plaintiff in charge to one J. K. then and there being a constable and peace-officer of and for our said lord the king, in and for the county of S. (or town and borough of S. in the county of S.) and then and there requested the said constable and peace-officer to take the said plaintiff in his custody, and safely keep him until he could be carried and conveyed, and to carry and convey him before some one of the justices assigned to keep the peace of our said lord the king, within the said county, [or, town and borough,] and to hear and determine divers felonies and misdemeanors committed within the said county, [or, town or borough,] to be examined by and before such justices touching and concerning the premises, and to be further dealt with according to law; and on that occasion the said J. K. being such constable and peace officer as aforesaid, at the request of the said defendant" then and there did take the said plaintiff into his custody, and as soon as conveniently could be, to wit, on the day and year aforesaid, the said plaintiff was carried and conveyed into custody before J. A. Esq. one of the justices assigned to keep the peace of our said lord the king, within and for the said county, (or, town and borough,) and also to hear and determine divers felonies and misdemeanors within the said county, [or, town and borough,] committed, to be examined by and before the said J. A. touching and concerning the premises, and to be further dealt with according to law (k), and by means of the said severe premises aforesaid, the said plaintiff was imprisoned, and kept and detained in prison, for the said space of time in the said declaration mentioned, the same being a reasonable time for that purpose, and lawful and just for the cause aforesaid. Which are the supposed trespasses in the said declaration mentioned, and whereof the said plaintiff hath above [1081] thereof complained against the said defendant, and this he is ready to verify, &c.—[Conclude with a verification, as ante, 907.]

*If any doubt as to whether plaintiff was a clerk or servant within the act, add another plea precisely similar, except in stating the plaintiff was "a servant" instead of "clerk."*

Plea, justifying imprisonment of plaintiff, on suspicion of felony (l).

[First plea, general issue as ante, 106; second plea, as follows:] And for a further plea in this behalf [as to the assaulting, seizing, and laying hold of the said plaintiff, as in the first count of the said declaration mentioned, and pulling and dragging about her the said plaintiff, and forcing and compelling her the said plaintiff to go from and out of a certain dwelling into the public street, and forcing and compelling her to go in and along the said streets to the said mansion-house, in the said first count mentioned; and as to imprisoning the said plaintiff, and keeping and detaining her in prison for the said time, in the said first count also mentioned];

(k) When the magistrate has full possession of the charge, the party laying it, in general ceases to be an actor in the matter, and need not justify acts done subsequently.

(l) The plea justifying the apprehension of plaintiff on suspicion of felony, must show the

cause of suspicion, 4 Taunt. 84; Holt, C. 1 P. 478. As to the causes for such suspicion, see Burn, J. tit. "Arrest."—The question of probable cause is a mixed proposition of law and fact. See 5 Bingham, 564, and the cases there cited.

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id defendant by leave, &c. saith [*actio non, as ante, 997.*]—Because he  
sa, that before and at the time when, &c. to wit, on, &c. aforesaid, at,  
a (venue) aforesaid, [*here state the felony to have been committed, and  
the causes of suspicion against the plaintiff, and which, in the plea in ques-  
tion, was stated as follows:*]—“the said plaintiff was the servant of the  
said defendant, and was then and there living and residing in the house of  
the said defendant; and the said plaintiff, so being such servant as  
aforesaid, to wit, at, &c. divers goods and chattels, to wit, 20 pair of  
stockings and 100 yards of lace, of great value, to wit, of the value  
£—the property of the said defendant, had been and were feloniously  
taken, and carried away from out of the possession of the said  
defendant (m), and afterwards, to wit, on, &c. at, &c. divers, to wit, 20  
bundles, containing the said goods and chattels so feloniously taken and [\*1082]  
carried away as aforesaid, were found and discovered hidden and con-  
cealed in a certain cellar of and belonging to the house of the said de-  
fendant, and to which the servants of the said defendant had access, and  
the said bundles, containing the said goods and chattels, being so found  
and discovered as aforesaid, were immediately seized and taken away by  
the said plaintiff, the said plaintiff then and there averring that the same  
were the property of her the said plaintiff, and the said plaintiff then and  
there endeavored to burn and make away with the said bundles, with their  
contents aforesaid, and did actually burn divers, to wit, 10 of the said  
bundles, so containing the said goods and chattels, the property of the  
said defendant as aforesaid;” wherefore the said defendant having good  
probable cause of suspicion, and vehemently suspecting the said plain-  
tiff to have been guilty of or concerned in the stealing and carrying away  
the said goods and chattels of the said defendant, and to have felon-  
iously taken and carried away the same, did, at the said time when, &c.  
gently lay hands on the said plaintiff, and did give the plaintiff in charge  
the W. S. then and there being a constable and peace officer of and  
our lord the king, in and for the [city of London] aforesaid, and then  
there requested the said constable and peace officer to take the said  
plaintiff into his custody, and safely keep her until she could be carried  
conveyed, and to carry and convey her before some one of the jus-  
tices assigned to keep the peace of our said lord the king within and for  
the city of London, and to hear and determine divers felonies and misde-  
meanors committed within the said city of London, to be examined by and  
before such justice, touching and concerning the premises, and to be fur-  
ther dealt with according to law;” and on that occasion the said W. S. go-  
ing such constable and peace officer as aforesaid, at the request of the  
said defendant, did then and there gently lay his hands upon the said  
plaintiff (n) take the said plaintiff into his custody, and as soon as con-  
veniently could be, to wit, on the said — day of — in the year afore-  
said, the said plaintiff was carried and conveyed in custody to and before

To justify an arrest by a private indi- own head, takes a party into custody on sus-  
without warrant, on suspicion, it is ab- picion, 8 Camp. 420.  
solutely necessary that a felony shall have (n) If the plaintiff resisted, see the form,  
actually committed. 6 B. & C. 637; post, 1086, 8.  
in the case of a constable, who, of his

TO  
PERSONS.

IMPRISON-  
MENT  
WITHOUT  
PROCESS.

[\*1083]

Sir W. L. knt. and alderman of the city of London, and one of the justices assigned to keep the peace of our said lord the king within and for the said city of London, and also to hear and determine divers felonies and misdemeanors committed within the said city, to be examined by and before the said Sir W. L. touching and concerning the premises, and to be further dealt with according to law, and the said plaintiff was then and there detained (o) by order of the said Sir W. L. until and upon the — day of — in the year aforesaid, when she the said plaintiff was examined by the said Sir W. L. touching and concerning the premises, and the said plaintiff was afterwards discharged out of custody by the said Sir W. L.; and by means of the said several premises aforesaid, the said plaintiff was imprisoned, and kept and detained in prison, for the said several spaces of time in the said declaration mentioned, the same being a reasonable time for that purpose, and lawful and just for the \*cause aforesaid, which are the supposed trespasses in the introductory part of this plea mentioned, and whereof the said plaintiff hath above complained against the said defendant, and this he is ready to verify (p); wherefore he prays judgment if the said plaintiff ought to have or maintain her aforesaid action thereof against him, &c.

IMPRISON-  
MENT  
UNDER  
PROCESS.

Justifica-  
tion of an  
arrest, &c.  
by a sher-  
iff's officer  
and another  
in his  
assistance,  
under a  
latitat  
against  
plaintiff  
(r).

[\*1084]

[*First plea, general issue, as ante, 1061; second plea, as follows:*]— And for a further plea in this behalf (q), [as to the making the said assault in the said first count mentioned, and with a little force and violence, pushing, forcing, and thrusting (s) the said plaintiff from and out of the said messuage or dwelling-house in the said first count of the said declaration mentioned, into the said street therein also mentioned, and whilst the said plaintiff continued on the ground in the said street, pulling, hauling, and dragging him upon his back through the mud and dirt, in and along the said street, and for the distance and length of way in the said first count also mentioned, and thereby a little hurting, bruising, and wounding the said plaintiff; and as to the imprisoning the said plaintiff, and keeping and detaining him in prison for the said space of time in the said first count mentioned, and as to the rending, tearing, damaging, and spoiling the clothes and wearing apparel of the said plaintiff in \*the said second count mentioned,] by the said defendants above supposed to have

(o) This and the other averments must agree with the facts.

(p) If the venue be laid out of the county where the party was taken before the magistrate, it may be necessary to make a special traverse of the trespasses having been elsewhere than in that county.

(q) This enumeration of the trespasses intended to be justified, must depend on the statements in the declaration, and as in many cases wholly unnecessary.

(r) See forms, 3 Lev. 61.—1 Saund. 296. 298, note 5.—1 Rich. C. P. 161—2 Id. 60.—16 East, 82—9 Wentw. Index. xviii. to civ. cix. As to the mode of pleading, see 1 Saund. 296, n. 1; 298, n. 1.—Com Dig. Pleader, 3 M. 24.—Ante, vol. i. Index, "Process;" as to the statement of different process, see ante, 445 to 462. How to plead in an inferior court, Cowp. 18.—2 T. R. 172.—Com. Dig. Pleader, 3 M. 24. Justification under a *latitat*,

executed in London, by a Serjeant at Mace, 9 Went. 381. If there be any doubt as to the regularity of issuing the writ, the officer should justify separately, and if the officer have been guilty of any excess, the plaintiff in the original action should also plead separately, 2 Stra. 1184.—1 Salk. 408, 9. The sheriff, in an action against him, must allege a return of *mesne process*, but the officer need not do so, Cro. Car. 446—5 B. & C. 488.

(s) The recital of the trespasses intended to be justified must depend on the facts of each particular case. When the plea justifies the wounding and actual beating, or more than a *molliter manus imposuit* to make the arrest, the particular resistance or occasion of such wounding, &c. must be stated in the subsequent part of the plea, as in this form, see ante, 1068, n. and 1 Saund. 296, n. 1, and post, 1086.

TO  
PERSONS.  
—  
IMPRISON-  
MENT  
UNDER  
PROCESS.

Issuing of  
the writ (d).

Indorsed  
for bail (x).

Delivery of  
writ to the  
sheriff (y).  
Warrant to  
one of the  
defendants  
(z).

[\*1085]

Delivery of  
warrant to  
one of de-  
fendants

Arrest by  
one of the

been done, the said defendants by leave of the court here, for this purpose first had and obtained, according to the form of the Statute in such case made and provided, say that the said plaintiff ought not to have or maintain his aforesaid action thereof against them, because they say, that before the said time when, &c. in the said [first and second counts] mentioned, to wit, on, &c. [teste of writ] a certain writ of our lord the now king, commonly called a *latitat*, was issued (u) out of the court of our said lord the king, before the king himself, the said court then and still being holden at Westminster, in the county of Middlesex (w), directed to the then sheriff of — by which said writ our said lord the king commanded the said sheriff that he should take the said plaintiff if he should be found in his bailiwick, and keep him safely, so that he might have his body before our said lord the king at Westminster aforesaid, on — next after — to answer to the said now defendant E. F. in a plea of trespass, and also to a bill of the said E. F. against the said plaintiff for £— upon promises [or as the plea was] according to the custom of the said court of our said lord the king, before the king himself to be exhibited; and that the said sheriff should have then and there that writ; which said writ was then and there duly indorsed for bail for £—; and which said writ so indorsed for bail as aforesaid; afterwards, and before the return thereof, and also before the said time when, &c. to wit, on, &c. at, &c. (venue) aforesaid, was delivered to G. H. esq. who then and from thenceforth until and at, and after the return of the said writ, was sheriff of the said county of — to be executed in due form of law; and thereupon the said G. H. so being sheriff as aforesaid, afterwards and before the return of the said writ, and before the said time when, &c. in the said [first and second counts mentioned,] to wit on the same day and year last aforesaid, at, &c. aforesaid, made his certain warrant in writing, under his hand and seal of office of sheriff aforesaid, directed to the keeper of the gaol of the said county of — and to the said C. D. the said sheriff's bailiff, and thereby commanded him the said C. D. that he should take the said plaintiff if he should be found in his bailiwick, and safely keep him, so that the said sheriff might have the body of the said plaintiff before our said lord the king at Westminster aforesaid, on — next after — to answer the said E. F. in the plea, and to the bill in the said writ mentioned; which said warrant afterwards, and before the return of the said writ, and before the said time when, &c. in the said first and second counts mentioned, to wit, on the day and year last aforesaid, at, &c. aforesaid, was delivered to the said C. D. to be executed in due form of law. By virtue of which said writ and warrant, the said C. D. as such bailiff as aforesaid, and the

(d) The process must be stated specially, 1 Saund. 286, n. 1.—Co. Lit. 288 a. If the arrest were under a bill of Middlesex, or a special *capias* by original, or a *capias* in C. P. describe the process, as ante, 445 to 452.

(e) See 3 Lev. 68; if the plaintiff in the original action justify alone, the plea may state that he caused it to be issued, &c.

(w) As to this allegation, see ante, 446, n. 1 Saund. 800 b, note 7.

(x) See ante, 447. The indorsement for bail should be stated, 10 B. C. 202; and it is usual, (though unnecessary, id. ibid.) to refer to the affidavit to hold to bail. 1 Saund. 286, note 2.—3 T. R. 183; but it is unnecessary to

state the particulars of the cause of action, even in a justification by the plaintiff in the original action, and though under process of an inferior court, 3 T. R. 183.—Cowp. 18.

(y) This allegation is not necessary, though usual. Green v. Jones. 1 Saund. 298.

(z) Examine with the warrant. See the form in 3 Lev. 68; and the mode of pleading a warrant, 1 Saund. 298, n. 5. It is not necessary in this case to state that the warrant was under seal, 2 Saund. 805, n. 13, and see the form in 1 Saund. 296; when it is necessary, see Com. Dig. Pleader, 3 M. 24.—Willes 411.—Bul. N. P. 83.

TO  
PERSONA.  
—  
IMPRISON-  
MENT  
UNDER  
PROCESS.  
—

defendants  
as bailiff,  
and by the  
other in  
his aid.  
Necessity  
to remove  
plaintiff to  
a place of  
safe custo-  
dy, and his  
resistance  
(a).

[\*1086]

Plaintiff's  
attempt to  
escape.

[\*1087]

said E. F. as his servant, and by his command, afterwards, and before the time appointed for the return of the said writ, to wit, at the said time when, &c. in the said [first and second counts] mentioned, and within the bailiwick of the said sheriff, to wit, at, &c. (*venue*) aforesaid, took and arrested the said plaintiff by his body, [in the said messuage or dwelling house in the said first count mentioned] and kept and detained him in the custody of the the said C. D. at the suit of the said F. F. for the cause aforesaid, for the said space of time in the said first count mentioned, as it was lawful for them to do for the cause aforesaid (a). And because at the said time when, &c. in the said first and second counts mentioned, the said plaintiff having been so arrested as aforesaid, it was necessary and expedient, in order to keep him in safe custody, under and by virtue of the said writ and "warrant, and to prevent him from escaping out of such custody, that the said plaintiff should be taken by and in the custody of the said C. D. out of the said messuage or dwelling-house, in the said first count mentioned (the same not being a place where the said plaintiff could be kept in safe custody by the said C. D. in pursuance of the said writ and warrant), to some place in the said bailiwick, where he might be kept in the safe custody of the said C. D. under and by virtue of the said writ and warrant, and because the said plaintiff, being then and there requested by the said C. D. peaceably and quietly to go out of the said messuage or dwelling-house with the said C. D. for the purpose aforesaid, would not peaceably or quietly go with, nor could otherwise be taken by the said C. D. from and out of the said messuage or dwelling-house to such place, for the purpose of being kept in safe custody as aforesaid, the said C. D. as such bailiff as aforesaid, and the said E. F. as his servant, and by his command, before the time appointed for the return of the said writ, to wit, at the said time when, &c. in the said first count mentioned, within the bailiwick of the said sheriff, were forced and obliged to, and did then and there necessarily and unavoidably, in order to keep the said plaintiff in safe custody under and by virtue of the said writ and warrant, and to prevent him from escaping out of the custody of the said C. D. so being such bailiff as aforesaid, with a little force and violence push, force, and thrust the said plaintiff from and out of the said messuage or dwelling-house in the said first count mentioned, into the said street there; and because the said plaintiff, at the said times when, &c. in the said first and second counts mentioned (b), being down on the ground in the said street, wholly refused peaceably or quietly to go with, nor could be otherwise taken, (c) by the said C. D. to a place wherein he might be kept in safe custody, under and by virtue of the said writ and warrant, and being so in custody as aforesaid, attempted to escape from and out of the same custody, the said defendants, for the purpose of taking him to some place of safe custody as afore-

(a) Where only an arrest is justified, the plea ends here with a verification, see the form 3 Lev. 68; but if a wounding or actual battery be justified, the occasion thereof be stated in the above form, ante, 1068, note; and 1 Saund. 296, note 1. As to taking the defendant to a lock-up house, see the 32 G. 2, c. 28.

(b) Or "then and there resisted the said arrest and imprisonment, and endeavored to escape therefrom, therefore the said — as

such bailiff as aforesaid, and the said — in his aid and assistance, and by his command, then and there necessarily gave and struck, &c. in struggling with the said plaintiff to prevent his escape as aforesaid, &c. &c." *at supra*.

(c) Defendant must prove this, and the plea would be demurrable without it, or an averment in effect similar, *per Bayley, J. 5 B. & A. 223*.

said and to prevent him from escaping out of the custody of the said O. D. were forced and obliged to pull, haul, and drag the said plaintiff upon his back through the mud and dirt, in and along the said street there, for the distance and length of way in the said first count mentioned, and in so doing unavoidably a little hurt, bruised and wounded the said plaintiff, and a little rent, tore, damaged, and spoiled the said clothes and wearing apparel of the said plaintiff in the said second count mentioned, the said defendants doing as little damage to the said plaintiff, and his said clothes and wearing apparel as they possibly could on those occasions; which are the said supposed trespasses in the introductory part of this plea mentioned, and whereof the said plaintiff hath above complained against them the said defendants\* (d). And this, &c. — [Conclude with a verification, as ante, 907, sixth form.]

TO  
PERSONS.  
—  
IMPRISON-  
MENT  
UNDER  
PROCESS.

[Same as the last form, as far as the asterisk, omitting the statement of the warrant, alleging that the sheriff himself made the arrest, and state the return of the writ as follows:]—And the said defendant further saith, that afterwards, and at the return of the said writ, to wit, on the said — next after —, he the said defendant duly returned the said writ to the said court of our said lord the king, before the king himself, at Westminster aforesaid, and then and there returned thereon, that by virtue thereof he the said defendant had taken the said plaintiff, whose body he had ready, as by the said writ he was commanded; as by the said writ and the said return thereof remaining of record in the said court of our said lord the king, before the king himself here, to wit, at Westminster aforesaid, more fully appears. And this, &c.—[Conclude with a verification, as ante, 907, sixth form.]

The like by the sheriff or officer to whom the writ is directed (e).

\*[First plea, general issue, as ante, 1061; second plea, as follows:] [\*1088] —And for a further plea in this behalf, [as to the said assaulting the said plaintiff, in the said first count of the said declaration mentioned, and imprisoning him, and keeping and detaining him in prison for the said time in the first count mentioned, above supposed to have been done by the said defendant,] he the said defendant, by leave, &c. [actio non, as ante, 906.]—Because he says, that one E. F. before the said time when, &c. to wit, in — Term, in the — year of the reign, &c. [state the recovery of the judgment in debt or assumpsit, and the reference to the record, as in the forms, ante, 482 to 493, and then proceed as follows:]—And the said defendant in fact further saith, that he the said defendant, before and at the said time when, &c. was, and from thenceforth hath been, and still is, one of the attornies of the said court of our said lord the king, before the king himself, (or, if in C. P. "of the Bench aforesaid,") and that

Justification by attorney under a capias ad satisfaciendum (f). Recovery of the judgment. Defendant as attorney issued ca. sa.

(d) If the defendants justify an arrest at another place or time than that mentioned in the declaration, there may be occasion here for a traverse, as ante, 1074; and see the precedents, 3 Lev. 63. Cro. Eliz. 860.

(e) See forms, Lutw. 236. If the sheriff, or the officer to whom mesne process is directed, justify imprisonment by force of such process, he must show the writ to be returned, but the bailiff who has a warrant from the sheriff, or any person who acts in his aid, need not, 1 Salk. 409. 12 Mod. 296—Com.

Dig. Pleader, 8 M. 24.—6 T. R. 285.—Ante, vol. xi. Index, "Process." In case of writs of execution, no return need be stated, 10 East, 82.—Willes, 126.

(f) See forms, 9 Wentw. 351, and Index, cxv. &c.—Com. Dig. Pleader, 8 M. 24. In a justification under a ca. sa. by the plaintiff in the former suit, or his attorney, he must state the judgment as well as the execution, 1 Salk. 409, and the officer should not join with him, if there be any doubt as to the regularity of the judgment, 2 Stra. 1184.

TO  
PERSONS.  
—  
IMPRISON-  
MENT  
UNDER  
PROCESS.

Delivery of writ by defendant to sheriffs of London.

[\*1089]  
The caption.

being such attorney, and the said judgment so recovered by the said E. F. as aforesaid, being in full force, and the damages therein mentioned, and so adjudged to the said E. F. as aforesaid, unpaid and unsatisfied, he the said defendant, before the said time when, &c. to wit, on the — year aforesaid, as the lawful attorney of and for the said E. F. in that behalf, and by virtue of his retainer in that behalf, caused to be issued out of the said court of our said lord the king, before the king himself, (or, *if in C. P.* “of the Bench aforesaid,”) at Westminster aforesaid, upon the said judgment, a certain writ of our said lord the king, called a *capias ad satisfaciendum* against the said plaintiff, directed to the sheriffs of London, by which said writ our said lord the king commanded, &c. [*here state the ca. sa. as ante, 417, and then proceed as follows:*] which said writ he the said defendant, as such attorney for the said E. F. as aforesaid, and as he lawfully might, afterwards, and before the return thereof, and also before the said time when, &c. to wit, on the — day of — A. D. — at, &c. (*venue*) aforesaid, delivered to one — esq. and — esq. who then and from “thenceforth, until, and at and after the said time when, &c. were sheriffs of [London], to be executed in due form of law (*g*); by virtue of which said writ, the said sheriffs of [London,] afterwards, and before the return of the said writ, to wit on the day and year in the said declaration mentioned, being the said time when, &c. and within their bailiwick as such sheriffs, that is to say, at [London] aforesaid took and arrested the said plaintiff by his body, and kept and detained him in their custody, under and by virtue of the said writ, and for the cause therein specified, for the said time in the said declaration mentioned, as they lawfully might, which is the said supposed trespass in the introductory part of this plea mentioned, and whereof the said plaintiff hath above complained against him the said defendant. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

The like by sheriff's officer under a writ of *ca. sa.* (*h*).

[*First plea, general issue, as ante, 1061; second plea, as follows:*]— And for a further plea in this behalf, [as to the said assaulting the said plaintiff in the said first count of the said declaration mentioned, and imprisoning him, and keeping and detaining him in prison for the said time in the said first count of the said declaration mentioned, and above supposed to have been done by the said defendant (*i*),] he the said defendant by leave, &c. [*actio non, as ante, 906;*] because he says, that one E. F. before the said time when, &c. to wit, in — Term, in the — year of the reign of our said lord the now king, sued and prosecuted out of the said court of our said lord the king, before the king himself, (or, *if in C. P.* “out of the court of our said lord the king of the Bench,”) (the said court then and still being held at Westminster, in the county of Middlesex) a certain writ of our said lord the now king, called a *capias ad satisfaciendum*, against the said plaintiff, directed to the sheriff of —, by which said writ our said lord the king commanded (*k*) the said sheriff that he should take the said plaintiff, if he should be found in his bailiwick, and

(*g*) In another form the sheriff's warrant was stated, 9 Wentw. 351; but see 16 East, 82.

(*h*) See the notes to the last form, Com Dig. Pleader, 8 M. 24. If the sheriff, or his officer, plead separately, he need not state the

judgment, *Id. ibid.*

(*i*) This enumeration of the trespass must depend on the statements in the declaration, and is in many cases not necessary.

(*k*) Examine carefully with the writ.



him safely keep, so that he might have his body before our said lord the king, (or, if in *C. P.* "before his majesty's justices of the Bench,") at Westminster, on — next after —, then next and now last past, to satisfy the said E. F. for £ — which in the said court of our said lord the now king before the king himself, (or, if in *C. P.* "before his majesty's justices of the Bench aforesaid,") at Westminster aforesaid, were awarded to the said E. F. for his damages, which he had sustained as well by reason of the not performing certain promises and undertaking, made by the said plaintiff to the said E. F. as for his costs and charges, whereof the said plaintiff was convicted, and that the said sheriff should have there that writ; which said writ was afterwards, and before the return thereof, and also before the said time when, &c. to wit, on the — day of —, A. D. —, at, &c. (*venue*) aforesaid, delivered to one —, esq. who then and from thenceforth, until, and at and after the said time when, &c. was sheriff of — aforesaid, to be executed in due form of law; whereupon he the said —, so being such sheriff of — as aforesaid, afterwards, and before the return of the said writ, and also before the said time when, &c. to wit, on, &c. last aforesaid, for having execution of the said writ, made his warrant in writing, sealed with the seal of his said office of sheriff of — aforesaid, and then and there directed the same to the said defendant, who then and there, and until and at and after the said time when, &c. was bailiff of the said sheriff of —, and by the said warrant commanded him that he should take the said plaintiff, if he should be found within the said sheriff's bailiwick, and him safely keep, so that he the said sheriff might have his body before our said lord the king, (or, if in *C. P.* "before his majesty's justices of the Bench,") at Westminster, on the said — next after —, to satisfy the said E. F. for his damages aforesaid, by him in form aforesaid recovered, according to the exigency of the said writ; which said warrant afterwards, and before the return of the said writ, and also before the said time when, &c. to wit, on, &c. last aforesaid, at, &c. (*venue*) aforesaid, was delivered to the said defendant to be executed in due form of law; by virtue of which said warrant the said defendant, as such sheriff's officer as aforesaid, afterwards and before the return of the said writ, to wit, on the same day and year in the said declaration mentioned, being the said time when, &c. within the bailiwick of the said then sheriff of — aforesaid, that is to wit, at, &c. (*venue*) aforesaid, in execution of the said warrant, gently laid his hands upon the said plaintiff to take and arrest him by virtue of the said writ and warrant, and did then and there arrest and take him into custody by virtue of the said writ and warrant, and kept and detained him in custody by virtue of the said writ and warrant, and for the cause therein mentioned, and in the said writ specified for the said time in the said declaration mentioned, as he lawfully might for the cause aforesaid; which are the said supposed trespasses in the introductory part of this plea mentioned, and whereof the said plaintiff hath above thereof complained against him. And this (*I*), &c.—[*Conclude with a justification, as ante, 907, sixth form.*]

TO  
PERSONS.IMPRISON-  
MENT  
UNDER  
PROCESSWarrant to  
defendant.Caption  
under the  
warrant.

[\*1091]

[*First plea, general issue, as ante, 1061; second plea, actio non, as ante, 906. If only part of the trespass can be justified in law, then con-*

Plea justifying the imprisonment.

(1) If the venue be in a different place to that in which the arrest was made, it may be necessary to insert a special traverse.

TO  
PERSONS.

IMPRISON-  
MENT  
UNDER  
PROCESS.

ment of  
plaintiff by  
defendant,  
as an offi-  
cer of the  
Palace  
Court, in  
execution  
of a *ca. sa.*  
issued out  
of that  
court  
against  
plaintiff,  
upon a  
judgment  
therein.

*fine the plea to those trespasses which can be justified.*]—Because he says, that before the said time when, &c. at the court of the king's palace of Westminster, held at Southwark, in the county of Surry, within the jurisdiction of the said court, on, &c. before H. T. C. who then and there, and from thence until the time of the issuing of the writ hereinafter mentioned, was steward of the same court, J. W. by the consideration and judgment of the same court, recovered against the said plaintiff £—, which the same court there adjudged to him for his damages, costs, and charges, which he had sustained in a certain plea of trespass on the case by the said J. W. against the said plaintiff, in the said court there lately prosecuted, whereof, the said plaintiff was convicted, as by the record of the proceedings therein still remaining in that court more fully appears. And the said defendant further says, that the said J. W. for having execution of the said judgment, afterwards, to wit, on, &c. (*day of issuing writ, or about it*) sued and prosecuted out of the said court a certain writ of our said lord the king, called a *ca. sa.* upon the said judgment, against the said plaintiff, directed (*m*) to the bearers of the virges of our said lord the king's household, officers and ministers of the court of his palace of Westminster, and every of them, greeting, commanding them and every of them, or one of them, to take the said plaintiff if he should be found within the jurisdiction of the said court, and him safely to keep, so that they or one of them might have his body before the judge of the said court, at the then next court of the palace of Westminster aforesaid, on, &c. to be held at Southwark aforesaid, in the said county of Surrey, to satisfy the said J. W. £—, which to him the said J. W. in the said court were adjudged, for damages, costs, and charges, which he sustained in a certain plea of trespass on the case by the said J. W. against the said plaintiff, in the said court then lately prosecuted, whereof the said plaintiff was convicted; and the said bearers should there then have that writ, which said writ afterwards, and before the delivery thereof to the said bearers as afterwards, was duly indorsed with a direction to the said bearers to beware that the said L. was not privileged or protected, and requiring them to take £—, which said writ so indorsed afterwards, and before the return thereof, and before the said time when, &c. to wit, on, &c. at Southwark aforesaid, in the county aforesaid, and within the jurisdiction of the said court of the palace aforesaid; was delivered to the said defendant, who then and from thence, and at and after the return of the said writ, was one of the bearers of the virges of the said king's household, and an officer and minister of the said court of the palace aforesaid, to be executed in due form of law, by virtue of which said writ he the said defendant so being one such bearer, officer, and minister as aforesaid, afterwards and before the return of the said writ, to wit, on the said, &c. (*day in the declaration*) at Southwark aforesaid, in the county aforesaid, and within the jurisdiction of the said court, in execution of the said writ, gently laid his hands upon the said plaintiff, in order to arrest him for the cause aforesaid, and did then and there accordingly arrest him for the cause aforesaid, and imprisoned and kept, and detained him in prison there, and within the jurisdiction aforesaid, for a certain time, to wit, for the space of time in the said declaration mentioned, as it was lawful for

(*m*) Take care to set out the writ accurately, and examine therewith.

him to do for the cause aforesaid, which are the same supposed trespasses in the introductory part of this plea mentioned, whereof the said plaintiff hath above complained against the said defendant; without this, that he the said plaintiff was or is guilty of the premises aforesaid, at, &c. (*venue*) or elsewhere, out of the jurisdiction of the said court; and this he is ready to verify, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

TO  
PERSONS.  
—  
IMPRISON-  
MENT  
UNDER  
PROCESS.

[*First plea, general issue, 1061; second, after enumerating the trespass intended to be justified, if necessary so to do, actio non, as ante, 906.*]—Plea of justification under warrant of a magistrate for an assault (*n*)  
Because he says, that just before the said times when, &c. in the said declaration mentioned, to wit, on the said, &c. at, &c. (*venue*), the said plaintiff, with force and arms, &c. [*here state the cause for which the warrant was taken out, which, in the case in question, was as follows:*] made an assault upon the said defendant, and then and there beat and ill-treated the said defendant, in breach and violation of the peace of our lord the now king, whereupon the said defendant, afterwards, to wit, on, &c. at, &c. duly applied to C. esq. he then and there being one of the justices of our said lord the king, assigned to keep the peace of our said lord the king, in and for the said county of M. and then and there duly made oath of the said last-mentioned trespasses committed by the said plaintiff on the said defendant as last aforesaid; and thereupon the said C. so being such justice aforesaid, afterwards, to wit, on the day and year last aforesaid, at, &c. duly made and issued his said certain warrant, under his hand and seal, bearing date, to wit, the day and year last aforesaid, directed (*o*) to all constables and his majesty's officers of the peace, whom the same warrant might concern, and thereby commanded them, and every of them, upon (*p*) sight thereof, to take and bring before him the said justice, or some other of his majesty's justices of the peace for the said county, the body of the said plaintiff to answer all such matters and things as in his majesty's behalf should be objected against him the said plaintiff by the said defendant, for assaulting and beating the said defendant on the — day of — in the said county, in breach of the peace of our said lord the king, which said warrant afterwards, \*and before the said time when, &c. in the said declaration mentioned, to wit, on, &c. the said defendant duly caused to be delivered to one — who then and from thence, and until the said time when, &c. was a constable and peace-officer in and for the said county of M. in due form of law to be executed, by virtue of which said warrant, he the said — so being such constable and peace-officer as aforesaid, and the said defendant, in his aid and assistance, and by his command, afterwards, to wit, at the said time when, &c. that is to say, on, &c. gently laid their hands on the said plaintiff in order to take, and did then and there take the said plaintiff into the custody of the said —, until the said defendant afterwards, and as soon as conveniently could be, was carried in the said county of M., to and before the said C. then being one of his majesty's justices afore- [\*1092]

(*n*) Though this defense may be given in evidence under the general issue, (see Com. Dig. Pleading, 3 M. 28.—Holt's C. N. P. 478,) yet it is frequently advisable to plead the matter specially, as it tends to diminish the evidence on the part of the defendant, and compel the plaintiff to new assign any excess

which he might otherwise give in evidence by surprise, in answer to the defense under the general issue.

(*o*) Let this agree with the direction of the warrant.

(*p*) Let this agree with the command as stated in the warrant.

TO  
PERSONS.  
—  
IMPRISON-  
MENT  
UNDER  
PROCESS.

said, to keep the peace in and for the said county of M. for examination concerning the premises, and on that occasion the said plaintiff was necessarily and unavoidably imprisoned, and kept and detained in prison for the said space of time in the said declaration mentioned, and the said defendant committed the said supposed trespasses in the introductory part of this plea mentioned, and whereof the said plaintiff hath above thereof complained, which are the said several supposed trespasses in the said declaration mentioned, and whereof the said plaintiff hath above complained against him; without this, that the said defendant was guilty of the said supposed trespasses in the said declaration mentioned, or any or either of them, elsewhere than in the said county of M. and in taking and carrying the said plaintiff in the said county of M. to and before the said C. as aforesaid, or at any time there, on the said — day of — and in execution of the said warrant. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

TO  
PERSONAL  
PROPERTY.  
Justifica-  
tion of tak-  
ing and  
impound-  
ing cattle  
as a dis-  
tress dam-  
age fea-  
sant (g).

[\*1093]

C. D. }  
ats. } [First plea, general issue, as ante, 1061; second plea, as fol-  
A. B. } lows:—And for a further plea in this behalf, as to the seizing  
and taking the said cattle of the said plaintiff in the said first count of the  
said declaration mentioned, and leading and driving away the same, and  
impounding and keeping the same for the space of —, part of the said  
time in the said first count mentioned, and until the said plaintiff was  
forced and obliged to pay the said sum of £— in the said first count men-  
tioned, and to have the same released and restored to the said plaintiff, as in  
the said first count mentioned (r) the said defendant by leave, &c. [*actio*  
*non, as ante, 906, third form.*] because he says, that the said defendant,  
before and at the said time when, &c. was lawfully possessed (s) of a cer-  
tain close, with the appurtenances, called — (t), situate in the parish  
aforesaid, in the county aforesaid (u); and because the said cattle in the  
said first count mentioned, before and at the said time when, &c. in the  
said first count mentioned, were wrongfully in the said close of the said  
defendant, in which, &c. eating and depasturing the grass and herbage of  
the said defendant there then growing, and doing damage there to the said  
defendant, he the said defendant, at the said time when, &c. seized and  
took the said cattle in the said declaration mentioned, in the said close of  
the said defendant, so doing damage therein as aforesaid, as a distress for  
the said damage, and led and drove away the same out of the same close,  
in which, &c. to a certain common pound in the parish aforesaid, and  
there impounded the same, and kept the same impounded for the said

(g) See forms, 9 Wentw. Index, lxxi lxxii. lxxvi. lxxiii.—3 Wils. 20.—Morg. 638.—Plead. A. 486, and the law, Com. Dig. Pleader, 8 M. 26. See a form of avowry in replevin as copyholder, and notes, ante, 1059. See a plea justifying an entry into premises to make a distress for rent, post, 1106. In replevin, we have seen that it is necessary in the plea to set forth the defendant's title, but in trespass, it is sufficient to state that the defendant was "lawfully possessed," ante, 1054, notes f. and g.—1 Saund. 221, note 1.—1 East, 212. If the defendant justify as servant of another, state in the commencement of the plea, that one E. F. was possessed, &c. and in stating the distress, say, that "he the said defend-  
ant, as the servant of the said E. F. and by

his command, at the said time when, &c. seized, &c." see 1 Saund. 221.

(r) This enumeration of the trespasses intended to be justified, must depend on the statement in the declaration, and in many cases may be unnecessary.

(s) This is sufficient, 2 Salk. 643.—4 M. & S. 392.—18 East, 343.

(t) Or "abutting, &c." setting out the abutments, as ante, 863.

(u) This is necessary, 6 Mod. 117, and if the parish or place be different to that stated in the declaration, the plea should conclude with a traverse, see ante, vol. i Index "Traverse." Ante, 1074.—See 1 Saund. 221 n. 1.—2 Salk. 453.

TO  
PERSONAL  
PROPERTY.

space of time in the introductory part of this plea, and in the said declaration mentioned, and until the said plaintiff paid to the said defendant the said sum of £— in the said first count mentioned, to have the same released and restored to the said plaintiff, as and for the same, then and there being a reasonable satisfaction for the said damage so done by the said cattle as aforesaid (*w*), \*as it was lawful for the said defendant to do for the cause aforesaid; which are the same supposed trespasses in the introductory part of this plea mentioned, and whereof the said plaintiff hath above thereof complained against the said defendant. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

[\*1094]

[*First plea, general issue, as ante, 1061; second plea, as follows:*]

And for a further plea in this behalf [as to the seizing, taking, removing, and carrying away the said goods and chattels in the said declaration mentioned (*y*)] the said defendant, by leave, &c. [*actio non, &c. as ante, 906, third form.*] because he saith, that before and at the said time when, &c. he the said defendant was lawfully possessed of a certain close called —, [or of no name,] situate, at, &c. and because the said goods and chattels in the said last count mentioned, before and at the said time when, &c. in the said last count mentioned, were wrongfully in and upon the said close or piece or parcel of land, encumbering the same, and doing damage there to the said defendant, he the said defendant, at the said time when, &c. in the said last count mentioned, seized and took the said goods and chattels in the said last count mentioned, in the said close, &c. or parcel of land, so encumbering the same as aforesaid, and removed and carried away the same to a small and convenient distance, to wit, in the parish aforesaid, and there left the same for the use (*z*) of the said plaintiff, doing no unnecessary damage to the said goods and chattels, on the occasion aforesaid, and as he lawfully might for the cause aforesaid; which are the same supposed trespasses in the introductory part of this plea mentioned, and whereof the said plaintiff hath above thereof complained against him the said defendant. And this, &c.—[*Conclude with a verification, as ante, 907, sixth.*]

IMPOUND-  
ING DIS-  
TRESS, DAM-  
AGE FEAS-  
ANT.

Justification of the removal of goods to a small distance, because the same were encumbering defendant's close.

And for a further plea [*actio non, as ante, 906,*] because he says, that certain river called the river — running and flowing in the county aforesaid, for a long time before and at the time of the committing of the said supposed trespasses, was and still is a common and public navigable river and highway for all the liege subjects of our said lord the king, with their barges and other vessels, to navigate, pass, repass, and labor, in and along the same, at their free will and pleasure; and the said defendant

REMOVAL  
OF A PUB-  
LIC NUI-  
SANCE.

Plea to trespass for removing tunnels, &c. justifying on the ground that tunnels were withdrawing water from a public river (*a*).

*b*) These averments must depend on the contents in the declaration, and may be in some unnecessary.

*c*) See notes to the last form.

*d*) If the declaration be only for the taking of goods, this enumeration of the trespasses intended to be justified would be unnecessary.

*e*) This is traversable, and when to traverse it, see 4 T. R. 864; and what removal is liable, and to where, see 1 Stark. 173.

*f*) Any one may justify the removal of a nuisance either at land or by water.

Hale de Port. Mar. p. 2, c. 7. An entry to abate a nuisance which is dangerous to the public safety, and which requires immediate abatement, may be made without any demand; for necessity will justify an immediate entry. But where there is no such necessity, some application and notice must be made and given to the owner of the soil to abate the nuisance. See the law and authorities in 8 D. & R. 556—2 B. & C. 202, 8. C. As to the right to obstruct the encroachments of the sea, see 8 B. & C. 856.

TO  
PERSONAL  
PROPERTY.

REMOVAL  
OF A PUBLIC  
NUISANCE.

further saith, that because the said tunnels in the said declaration mentioned, at the said time when, &c. had been and then were wrongfully, unlawfully and unjustly kept and continued open between the said river and the said deepening fen; so that divers large quantities of the water of the said river through the said tunnels escaped from the said river, and thereby the water necessary for navigating the said river became and was greatly diminished and lowered, and thereby the liege subjects of our said lord the king were hindered and prevented from navigating and using the said river so freely and advantageously as they otherwise might and would and ought to have done, therefore he the said defendant, being a liege subject of our said lord the king at the said time when, &c. in order to abate and remove the said nuisance, and to hinder and prevent the water in the said river, necessary to keep and continue the same navigable, from escaping from the said river through the said tunnels, did necessarily enter the said deepening fen, and dug up, force up, pull up, stop up, and a little injure the said tunnels of the said plaintiffs, so wrongfully, unlawfully, and injuriously kept and continued open as aforesaid, and hindered and prevented the water in the said river from running and escaping from the same, by and through the said tunnels, and in so doing necessarily broke to pieces and damaged divers parts of the said tunnels, and committed the other supposed trespasses, and the materials thereof coming and arising, to wit, the said materials, and goods and chattels, in the said declaration mentioned, removed to a small and convenient distance, and then and there laid and left the same for the use of the said plaintiffs, doing as little damage to the said plaintiffs as he possibly could on the occasions aforesaid, and as he lawfully might for the cause aforesaid, and which are the said supposed trespasses in the said declaration mentioned. And this he the said defendant is ready to verify; wherefore he prays judgment if the said plaintiffs ought to have or maintain their aforesaid action thereof against him, &c.

DISTRESS  
FOR RENT.  
Justifying  
trespasses  
under a  
distress for  
rent (b).

\* [First plea, not guilty, as ante, 1061; second plea, *actio non*, as ante, 906. If all trespasses in the declaration cannot be justified under a distress for rent, then confine the plea and justification accordingly.]—Because they say, that the said plaintiff, (or, “one E. F.”) for a long time, to wit, for the space of one (*the time during which the rent distrained for was accruing due*,) year next, before and on the 29th day of September, A. D. 1880, (*the day when the rent fell due*,) and from thence, until, and at the said time when, &c. held and enjoyed the said dwelling-house (*as in the declaration*) in which as tenant thereof to the said defendant, C. D. (or, “to one J. B.”) under and by virtue of a certain demise thereof, heretofore made, at and under the yearly rent of £40, payable quarterly, that is to say, on, &c. (*state the quarterly days, and describe the terms of the tenancy as to the payment of rent accurately*,) the — by even and equal portions; and the said defendants further say, that on the day and year last aforesaid, a large sum of money, to wit the sum of £40, of the rent aforesaid, for one year (*according to the fact*) of the

(b) By the 11 Geo. 2. c. 19, s. 21, this defense, where the distress is on the demised premises, may be given in evidence under the general issue. But it may be frequently advisable to plead it specially, in order to nar-

row the issue and the evidence at the trial. When the distress is off the demised premises, as in cases of fraudulent removal, &c. the defense must be pleaded specially, 1 Esp. 257;—4 Camp. 186. See post, 1137.

said term, ending on the day and year last aforesaid, and then last elapsed, became and was due and payable to the said defendant, C. D. (or, "the said J. B.") and at the said time when, &c. was in arrear and unpaid; wherefore the said defendant, C. D. in his own right, and the said defendant, G. H. as the bailiff of the said C. D. and by his command, on the said first day when, &c. did enter into and upon the said dwelling-house, in which, &c. for the purpose, and in order to seize, take, and distrain, and did then and there seize, take, and distrain the said goods and chattels in the said declaration mentioned, as and for a distress for the said rent so due and in arrear as aforesaid, and took and seized the same thereon as such distress as aforesaid, on the most fit and convenient part thereof for that purpose, according to the form of the Statute in such case made and provided, which are the same supposed trespasses in the introductory part of this plea mentioned. And this they the said defendants are ready to verify, &c. wherefore, &c.—[*Conclude with a verification, as ante, 907.*]

TO  
PERSONAL  
PROPERTY.

DISTRESS  
FOR RENT.

[*First plea, general issue, as ante, 1061; second plea, as follows:*— And for a further plea in this behalf, [as to the seizing and taking the said coals in the said first count of the said declaration mentioned, and keeping and detaining the same from the said plaintiff, for a certain space of time, to wit, for the space of — part of the said time in the said first count mentioned, and also as to the seizing, taking, and carrying away the said coals in the said last count mentioned, and converting and disposing thereof as therein mentioned,] the said defendant, by leave, &c. says, [*actio non, as ante, 906, third form,*] because he says, that long before and at the said time when, &c. one E. F. was and still is seized in his demesne as of fee, of and in a certain ancient port, gout, or haven, called — in the river — in the county of — and that he the said E. F. and all those whose estates he now hath and at the said times when, &c. had in the said port, gout, or haven, for the time being, from time whereof the memory of man is not to the contrary, have repaired and maintained, and have been used and accustomed to repair and maintain, and of right ought to repair and maintain the said port, gout, or haven, when and as often as it should be necessary, at his or their own proper costs and charges, for the use and benefit of all persons importing and exporting goods into or out of the said port, gout, or haven, for the benefit and advantage of trade and navigation there: And that he the said E. F. and all those whose estate he now hath, and at the same time when, &c. hath, of and in the said port, gout, or haven, with the appurtenances, from time whereof the memory of man is not to the contrary, have had, received and taken, and have been used and accustomed to have, and receive and take, and of right ought to have had, and received and taken, and still of right ought to have, receive and take, of and from every ship or vessel arriving in the said port, gout or haven, with upwards of ten chaldrons of coal on board thereof, and unlading the same coals there, a certain reasonable toll or duty, that is to say, four bags of coals, contain-

SEIZURE  
FOR PORT  
DUTIES.

Justifica-  
tion of tak-  
ing coals  
under a  
prescrip-  
tive right  
to port du-  
ties (c).

[\*1095]

E. F. seized  
of a  
port.

His obliga-  
tion to re-  
pair.

Prescrip-  
tive right  
to port du-  
ties.

(c) See forms, 9 Wentw. Ind. lxxiii. lxxvii. 3 Wentw. 124.—3 Burr. 1402.—Lutw. 1519. 2 Wils. 95.—Ld. Raym. 384. Another plea was added, stating the prescription to be

"to take a reasonable distress;" and another that the port duty was payable by persons not being legally exempted from the pay-

TO  
PERSONAL  
PROPERTY

SEIZURE  
FOR PORT  
DUTIES.

And to  
seize for  
the same.

Plaintiff  
indebted in  
tolls.

[\*1096]

Seizure by  
defendant  
as servant  
of E. F.

ing respectively divers, to wit, two bushels, and when and as often as the said toll or duty hath been and remained unpaid, after reasonable request and demand thereof made, the owners and proprietors of the said port, gout, or haven, for the time being, from time to time, from time whereof the memory of man is not to the contrary, have used and been accustomed to seize and take the said toll or duty, and to carry away the same, and to convert and dispose thereof to his and their own use: And the said defendant further says, that before either of the said times when, &c. a certain ship \*or vessel of the said plaintiff, with a greater quantity than ten chaldrons of coal, to wit, twenty chaldrons of coal on board thereof, arrived in the said port, gout, or haven, to wit, at, &c. (*venue*) aforesaid, and did there before either of the said times when, unlade the said last-mentioned quantity of coals, by reason whereof a certain toll or duty, to wit, — bags of coals containing respectively divers, to wit, two bushels, became and was due and payable from the said plaintiff to the said E. F. Whereupon the said defendant, just before the said time when, &c. to wit, on the day and year in the said declaration mentioned, as the servant of the said E. F. and by his command, in the said port, gout, or haven, demanded of and from the said plaintiff, the said toll or duty for the said coals, for and on account of the said E. F. whereupon the said plaintiff then and there refused to pay or deliver the same, and thereupon the said defendant, at the said times when, &c. in the said port, gout, or haven, as such servant of the said E. F. and by his command, seized, took, and carried away the said — bushels of coals in the said last count mentioned, as and for such toll or duty so due and payable as aforesaid, the same being part of the said coals so brought into the said port, gout, or haven, as aforesaid, and kept and detained the same for the said space of time in the said first count mentioned, and in so doing and in separating, and dividing and measuring the same, from the said coals so brought into the said port, gout, or haven as aforesaid, did necessarily and unavoidably seize and take, and keep and detain the residue of the said coals whereof the said coals in the said first count mentioned were part and parcel, for the said space of time in the introductory part of this plea mentioned, the same being a reasonable time for that purpose, doing no unnecessary damage to the said plaintiff on the occasion aforesaid, as it was lawful for him to do for the cause aforesaid: which are the same supposed trespasses in the introductory part of this plea mentioned, and whereof the said plaintiff hath above thereof complained against him; without this, that he the said defendant is guilty of the said seizing, taking, and keeping, and detaining the said coals in the said first count mentioned, or of seizing, taking, or carrying away the said coals in the said last count mentioned, at, &c. aforesaid, or elsewhere out of the said port, gout, or haven, in the river — aforesaid. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

JUSTIFY-  
ING KILL-  
ING DOGS,  
&c.

[\*1097]

Plea to a  
declaration  
for shoot-

C. D. }  
ats. }  
A. B. }

\*[*First plea, general issue to the whole; second plea, as follows:*—And for a further plea in this behalf, [as to the shooting off, firing-off, and discharging the said gun, in the said first count of the said declaration mentioned, at, towards, and against the said dog, in that count also mentioned, killing, striking, and wounding the said dog,



above supposed to have been done by the said defendant (e)] he the said defendant by leave, &c. [*actio, non, &c.*] because he says, that the said dog, in the said first count of the said declaration mentioned, [before the said time when, &c. in that count mentioned, had been, and was used and accustomed to hurt and worry sheep, to wit, at, &c. (*venue*) aforesaid. And the said defendant further saith, that the said dog being so used and accustomed to hurt and worry sheep,] just before the said time when, &c. to wit, on the day and year in the said first count mentioned, at the, &c. aforesaid, was hunting and worrying certain sheep of one E. F. of great value, [in a certain close of him the said E. F. there situate,] for which reason, and because the said dog could not otherwise be restrained or hindered from hunting and worrying the said sheep, he the said defendant, at the said time when, &c. as the servant of the said E. F. and by his command, shot-off, fired off, and discharged the said gun, in the said first count of the said declaration mentioned, at, towards, and against the said dog, and then and there shot, hit, struck and wounded the said dog, as it was lawful for him to do for the cause aforesaid, which is the above supposed trespass in the introductory part of this plea mentioned, and whereof the said plaintiff hath above complained against the said defendant, and this, &c.; wherefore, &c. and, &c.—[*Third plea same as second, omitting the words within the brackets.*]

[*First plea, not guilty, as ante, 1061; Second plea, actio non, as ante, 1061.*]—Because he saith, that just before and at the said time when, &c. the said defendant was driving the said gig and horse, in the said first count mentioned, in and along the king's highway, leaving ample and sufficient room for the said mare of the said plaintiff, then also at the said time when, &c. being and going in and along the said highway, to pass by the said gig and horse of the said defendant, nevertheless the said defendant in fact saith, that the said mare of the said plaintiff, at the said time when, &c. was so negligently, carelessly, and improperly managed, and was so unruly, that by and through such negligence, carelessness, and improper management, and such unruliness of the said mare as aforesaid, the said mare, at the said time when, &c. in the said first count mentioned, attempting to pass the said gig of the said defendant ran upon and struck against the said gig of the said defendant, and the said gig of the said defendant was thereby also then and there driven by the said defendant against the said mare, without any default on the part of the said defendant; and so the said defendant in fact saith, that if any hurt or damage happened to the said mare, it was caused by the said negligence, carelessness, and improper management of the said mare, and by the unruliness of the said mare, and not by the default of the said defendant which are the said supposed trespasses in the said [first count of the said] declaration mentioned, and whereof the said plaintiff hath above thereof complained against him. And this, &c. [*Conclude with a verification, as*

TO  
PERSONAL  
PROPERTY

ing a dog, that the dog was accustomed to bite sheep, and worry them and it was worrying the sheep of one E. F. in his closes, and because the dog could not otherwise be prevented from worrying said sheep, defendant, as servant of said E. F. shot said dog (d).

PLAINTIFF'S  
NEGLI-  
GENCE.

Plea to trespass, for running defendant's gig against plaintiff's mare, that defendant was driving the gig along the highway, leaving sufficient room, and that the mare was so badly managed, and so unruly, that thereby the accident happened (f).

(d) See 1 Saund. 84, and 3 Lutw. 1494. In a plea justifying killing dog in a warren, because it was pursuing the conies there, 1 Jac. 24; killing dog for pursuing deer in park, 2 Rich. Prac. C. P. 435, 5th ed. See 1 East, 668, as to the right to set dog-spears, 1 Hunt 481.—2 Marsh. 577.—1 Moore, 203, 2 C. In a plea justifying killing a dog, because it attacked defendant and was accus-

tomed to bite mankind; these allegations are material, and must be proved, 1 Car. N. P. Rep. 106.

(e) This enumeration of the trespasses intended to be justified, must depend on the statements in the declaration, and in many cases may be wholly unnecessary.

(f) That this defense must be pleaded specially, see 2 Camp 593.

TO  
PERSONAL  
PROPERTY.

PLAINTIFF'S  
NEGLI-  
GENCE.

Third plea,  
that plain-  
tiff's mare  
was so im-  
properly  
in the high-  
way, that  
by reason  
thereof the  
accident  
happened.

*ante*, 907, *sixth form*.]—And for a further plea, &c. [*actio non*, as *ante*, 906.]—Because he saith, that before and at the said time when, &c. in the first count mentioned, the said defendant was driving his said gig and horse in the first count mentioned, in and along the said king's highway, the said mare of the said plaintiff then also at the said time when, &c. being and going in and along the said highway, nevertheless the said defendant in fact saith, that the said mare of the said plaintiff at the said time when, &c. was so carelessly, negligently, and improperly managed, in the said highway, near to the said gig, that by reason thereof the said rig of the said defendant, by accident (*g*), and without any default on the part of the said defendant, but by and through the want of due care in the management of the said mare, then and there was driven upon and against the said mare, and thereby the said mare sustained the said injury in the said first count mentioned; and so the said defendant in fact saith; that if any hurt or damage happened to the said mare, it was caused by such accident, and not by the default of him the said defendant which are the said supposed trespasses, &c.—[*Conclude as in second plea*.]

LIBERUM  
TENEMENTUM.

Plea of *liberum tenementum* by one defendant in his own right, and by the other as his servant (*h*).

[\*1098]

*Actio non*,  
&c.

[*First plea, general issue, as ante*, 1061; *second plea, as follows*.:]—And for a further plea in this behalf, (as to the "breaking and entering the said close, in which, &c. in the said first count of the said declaration mentioned, and with feet in walking, treading down, trampling upon, consuming and spoiling the grass and herbage there then growing, and tearing up, forcing up, and removing the faggots in that count mentioned, and scraping up and collecting together the loose earth, soil, manure, and compost in the said first count mentioned, and beating down, throwing down, prostrating, and destroying part of the banks and mounds in that count also mentioned, and casting and throwing the said loose earth, soil, manure, and compost so scraped up and collected, and the earth and soil arising from the said banks and mounds so prostrated and destroyed as in the same count mentioned, from and out of the said close (*i*);] the said defendants by leave of the court, here for this purpose first had and obtained, according to the form of the Statute in such case made and pro-

(*g*) See the case in 4 Mod. 404, cited in 3 Wils. 411, 412.

(*h*) As to the plea of *liberum tenementum* in general, see *ante*, vol. i. Ind. "*Liberum Tenementum*;" and 1 Saund. 299 b, n. 6.—Com. Dig. Pleader, 8 M. 84.—Willes, 218.

*Et vide*, 2 Reeve's Hist. E. L. 841. A right of possession as a freeholder, or leaseholder, &c. may be given in evidence under the general issue, Not Guilty, see 8 T. R. 408; and in that case the defendant was, under the general issue, permitted to give in evidence the pulling down a wall. But in 8 East, 394, 400, the court held that the defendant could not justify, under the general issue, the cutting the posts and rails of another, though put upon the defendant's own soil; it is therefore frequently necessary to plead *liberum tenementum*, and to justify the cutting or removal of rails, &c. specially, as encumbering the defendant's land. This plea may also be advisable, in order to compel the plaintiff to new assign where he has not set forth the abutments, or name of the close in

his declaration, 11 East, 51, 65. 1 B. & C. 489—2 D. & R. 719, S. C.—1 Saund. 299 b. c. or to narrow the evidence as to the title of the parties; but unless some real advantage is to be gained by it, where there is a second count for removing or carrying away goods only, it may be advisable in a distinct plea to state, "that the defendant was lawfully possessed of a certain close, and that he took the goods encumbering the same, and moved them to a convenient distance, and there left them for the use of the plaintiff," as in the precedent, *ante*, 1094.—See 6 Mod. 117.—Willes, 222, n. b. See a plea justifying, on the ground that the *locus in quo* had been separated from the waste for twenty years, 2 Taunt. 156.

(*i*) The enumeration of these trespasses, intended to be justified, must depend on the statements in the declaration, and in many cases may be wholly unnecessary. See the note to the commencement of the next form of plea.

vided says, that the said plaintiff ought not to have or maintain his afore-  
 said action thereof against him\*, because he says, that the said close in the  
 said [first count of the said] declaration mentioned, and in which, &c.  
 now is, and at the said several times when, &c. was the close, soil, and  
 freehold of the said defendant E. F., to wit, at, &c. (*venue*) aforesaid;  
 wherefore the said defendant [E. F. in his own right, and the said \*C.  
 D. as the servant of the said E. F. *and by his command (k)*] at the said  
 times when, &c. in the said [first count of the said] declaration mention-  
 ed, [broke and entered the said close, in which, &c. in the said first  
 count mentioned, and with his feet † in walking, trod down, trampled  
 upon, consumed, and spoiled the said grass and herbage therein men-  
 tioned (l)] and because the said [faggots, earth, soil, manure, and com-  
 post in the said first count mentioned, and the said part of the said banks  
 and mounds in the said first count of the said declaration (m) mentioned]  
 before the said times when, &c. had been wrongfully and injuriously put  
 and placed, and were at those times remaining and being in and upon the  
 said close, in which, &c. and encumbering the same, he the said E. F.  
 in his own right, and the said C. D. as his servant and bailiff in that be-  
 half, and by such command as aforesaid, in order to remove the said en-  
 cumbrances, [tore up, forced up, and removed the said faggots, and  
 scraped up and collected together the said loose earth, soil, manure, and  
 compost, and beat down, threw down, prostrated, and destroyed the said  
 part of the said banks and mounds in the said first count mentioned, and  
 tore up and threw the said loose earth, soil, manure, and compost, so scrap-  
 ed up and collected, and the said earth and soil arising from the said  
 banks and mounds so prostrated and destroyed, as in the same count men-  
 tioned (m),] from and out of the said close, doing no unnecessary damage  
 to the said plaintiff on the occasion aforesaid; which are the same sup-  
 posed trespasses in the introductory part of this plea mentioned, and  
 whereof the said plaintiff hath above complained against the said defend-  
 ants. And this, &c.—[*Conclude with a verification, as ante, 907, sixth  
 form.*]

TO REAL  
PROPERTYLIBERUM  
TENEMENT-  
TUM.Locus in  
quo free-  
hold of de-  
fendant  
E. F.[\*1099]  
Defend-  
ant's entry  
&c. as his  
servant.

D. &amp; G. H. }

ats.

A. B. }

[*First plea, not guilty, as ante, 1061.*] And for a The like in  
 further plea in this behalf, the said defendants, by leave, a more  
 say, (*actio non, as ante, 906, third form.* If the trespasses in the concise  
 declaration relate entirely to land or realty, and not to any personal prop- form (n).  
 erty, there is no occasion for any recital, but otherwise it is necessary to  
 [\*1100]  
 qualify the plea in its commencement, by reciting \*the trespasses to the  
 land, as in the last form) because they say, that the said close in the said  
 declaration mentioned, and in which, &c. now is, and at the said several  
 times when, &c. was the close, soil, and freehold of the said C. D. to  
 wit, at, &c. aforesaid; wherefore the said C. D. in his own right, and  
 the said E. F. as his servant, and by his command, at the said several  
 times when, &c. committed the said several supposed trespasses in the  
 said declaration mentioned, (or, “in the introductory part of this plea

(k) These words are necessary if the de-  
 fendants or one of them, justify as the servant  
 of the freeholder, see ante, vol. i. Index.  
 (l) “*Trespass*.” The command is traversable in  
 cases, 11 East, 65.

(l) This averment between brackets must  
 depend on the averments in the declaration  
 See the next form.

(m) See ante, note l.

(n) See the notes to the above form.

TO REAL  
PROPERTY

*mentioned,"*) in the said close, in which, &c. so being the close, soil, and freehold of the said C. D. as they lawfully might for the cause aforesaid, which are the said several supposed trespasses, whereof the said plaintiff hath above thereof complained against them. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

SEISIN OF  
A COPY-  
HOLDER.  
Seisin in  
fee by a  
copy-holder  
(o).

[*First plea, general issue, as ante, 1061 ; second plea, same as ante, 1097, 8, to the asterisk, stating the trespasses intended to be justified, according to the declaration, if indeed there be any necessity for stating them, and then proceed as follows :*—Because he says, that the said close, in which, &c. in the said [first count of the said] declaration mentioned, now is, and at the said several times when, &c. in the said [first count of the said] declaration mentioned, was, and from time immemorial hath been within and parcel of the manor of —, in the county of —, and a customary tenement of that manor demised and demisable by copy of the court rolls of the said manor, by the lord of the said manor, or by his steward of the court of the said manor for the time being, to any person or persons willing to take the same in fee-simple or otherwise, at the will of the lord of the said manor, according to the custom of the said manor. And the said defendant further says, that long before either of the said times when, &c. in the said [first count of the said] declaration mentioned, to wit, on the — day of —, A. D. — E. F. esq. then being lord of the said manor, at his court baron then holden in and for the said manor, before G. H. —, then his steward of the court of the said manor, by copy of the court rolls of the said manor, granted to the said defendant amongst other things, the said close, in which, &c. to hold the same to the said defendant, his heirs and assigns forever, by copy of the court roll of the said manor, at the will of the lord of the said manor, according to the custom of the said manor ; by virtue of which said grant the said defendant afterwards, and before any of the said times when, &c. to wit, on the day and year last aforesaid, entered into the said close, in which, &c. and became and was seized thereof in his demesne as of fee, at the will of the lord of the said manor, according to the custom of the said manor, and continued so seized thereof until and at and after the said several times when, &c. ; wherefore the said defendant at the said times when, &c. in the said [first count of the said] declaration mentioned, broke and entered the said close, in which, &c. and with his feet, &c.—[*Conclude as in the form, ante, 1099, from the †.*]

[\*1101]

POSSESSION  
OF LESSEE.

Justification by tenant under a lease for years giving express color to plaintiff (p).

[*First plea, general issue, as ante, 1061 ; second plea, the same as the form, ante, 1097, 1098, to the asterisk, stating the trespasses intended to be justified, according to the declaration, if indeed there be any occasion to enumerate them, and then proceed as follows :*—Because he saith, that

(o) As to the mode of pleading a copy-hold title in general, see ante, 565, 569, 586, 8 As to the replication, 11 East, 70, n. a. If by the leases of a copyholder, the plea, after stating the seisin of the copyholder, as in this form, may state the demise as in the forms, post, 1101, 2 ; and a license by the lord to demise need not be stated, Bac. Ab. Leases, 1, 6.

(p) As to this plea, see Com. Dig. Pleader, 8 M. 40, 1 ; ante, vol. i. Index, "Color."

Though the right of possession may be given in evidence under the general issue, 8 T. R. 403, it is frequently advisable to plead this plea in order to compel the plaintiff to set forth his own title, or to admit some part of the defendant's ; and where the plaintiff, in *trespass quare clausum fregit*, states also the removal of personal property, or cutting down posts and rails, &c. this plea is necessary, 8 East, 404.

one E. F. before any of the said times when, &c. to wit, on, &c. at the parish aforesaid, in the county aforesaid, was seized in his demesne as of fee, of and in the said close in the said declaration mentioned, and in which, &c. with the appurtenances; and being so thereof seized, afterwards, and before any of the said times when, &c. in the said declaration mentioned, to wit, on the day and year last aforesaid, at the parish aforesaid, by a certain indenture then and there made between the said E. F. of the one part, and the said defendant of the other part, which said, &c. [here state the purport of the lease, and the demise and reference to the indenture, and the defendant's entry, as ante, 549, and then proceed as follows:—] And the said defendant being so possessed, the said plaintiff claiming title to the said close in which, &c. with the appurtenances, under color of a certain "character (r)" of demise, pretended to be thereof made to him by the said E. F. for the term of his natural life, before the making of the said demise by the said E. F. to the said defendant as aforesaid, whereas nothing of or in the said close in which, &c. or any part thereof, ever passed by virtue of that charter, afterwards \*and before any of the said times when, &c. and during the continuance of the said term so demised to the said defendant as aforesaid, to wit, on the said first day in the said declaration mentioned, entered into and upon the said close in which, &c. with the appurtenances, and was thereof possessed, and thereupon the said defendant at the said several times when, &c. entered into and upon the said close in the said declaration mentioned, and in which, &c. in and upon the said plaintiff's possession thereof, as being the close of the said defendant, and with his feet, &c.—[Same as the form, ante, 1099, from the † to the end, if the declaration require that form of pleading, and justifying the trespasses, according to the fact.]

TO REAL  
PROPERTY  
—  
POSSESSION  
OF LESSEE.

Color given (q).

[\*1102]

[First plea, general issue, as ante, 1061; second plea, same as the above form, except in the statement of the demise, which is to be as follows:—] And being so seized thereof, he the said E. F. afterwards and before either of the said times when, &c. to wit, on, &c. last aforesaid, &c. (venue) aforesaid, demised the said close, in which, &c. with the appurtenances, to the said defendant, to have and to hold the same to the said defendant from thenceforth for one year then next following, and fully to be complete and ended, and so from year to year for so long time as the said E. F. and the said defendant should respectively please (t). By virtue, &c.—[As in the above form to the end, adopting the words "tenancy," instead of "term."]

The like by a tenant from year to year (s).

[First plea, general issue; second plea, after enumerating trespasses, necessary, pleading actio non, as ante, 906.]—Because he says, that the said defendant, before and at the said time when, &c. and from thence hitherto hath been, and still is, lawfully possessed of and in a certain garden

REMOVAL  
OF PRIVATE  
NUISANCE.

Plea to trespass for felling, &c. trees that they overshadowed and damaged defendant's grounds (u).

(s) See a deed of feoffment pleaded by way of color, 2 Rich. C. P. 443.

(t) A necessary word, 2 Roll. Rep. 14.

(u) The tenancy, as to its commencement and duration, must be stated according to the

(v) See 4 East, 82; when the letting was for a year to year, this seems improper; because at the end of the first year, either party might determine the tenancy, which, according

ing to this form, he could not do.

(u) As to the right to abate a private nuisance, see 3 Bla. Com. 5. And as to the right to cut trees overshadowing defendant's land, see Roll. Rep. 894.—8 Bulstr. 198.—Vin. Ab. Tress. E. and Nuisance, W. 2, pl. 8.—2 B. & C. 811.—8 D. & R. 556, S. C. See form of plea justifying an entry into land to remove a wall, &c. obstructing defendant's ancient light, post.

TO REAL  
PROPERTY.

REMOVAL  
OF PRIVATE  
NUISANCE.

den or parcel of land, situate and being in the parish aforesaid, in "the county aforesaid, and that the said branches in the said first count mentioned, and the said wood and underwood, in the said last count mentioned, just before the said time when, &c. were overhanging, encumbering, and damaging the said garden or parcel of land of the said defendant, and the vegetables therein growing; wherefore he the said defendant, at the said time when, &c. did cut, lop, and top the said branches and underwood so overhanging, encumbering, and damaging the said close of the said plaintiff as aforesaid, and took and carried away the said branches, wood, underwood, and berries, to a small and convenient distance, and there left the same for the said plaintiff, as he lawfully might for the cause aforesaid, which are the said supposed trespasses whereof the said plaintiff hath complained against the said defendant. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

DEFECT OF  
FENCES.

Plea to trespass with cattle, that defendant was possessed of adjoining close, and that plaintiff ought to have repaired the fence between, and that the fence being out of repair, his cattle escaped into *locus in quo* and defendant entered to drive them out (w).

["1104"]

*Actio non, &c.*

Close mentioned in both courts the same (y).

Defendant possessed of a close adjoining *locus in quo* (a).

[*First plea, general issue, as ante, 1061; second plea, as follows:*—And for a further plea in this behalf, [as to the breaking and entering the said close in the said first count of the said declaration mentioned, and in which, &c. and with feet in walking, treading down, trampling upon, and spoiling the grass in the said close, and with the said cattle in the said first count mentioned, eating up, treading down, depasturing, consuming, and spoiling, other the grass growing in the said close, and with the said cattle tearing up, eating off, pulling up, plucking off, consuming, spoiling, biting off, topping, and destroying the spring wood and underwood in the said first count mentioned, and growing and being in the said close, and breaking down, throwing down, and destroying the said hedge and fence in the said first count mentioned, growing, standing, and being round and upon the said close, and as to the breaking and entering the said close in the said last count of the said declaration mentioned, and in which, &c. and with the said cattle in the said last count mentioned, treading down, depasturing, eating up, biting off, tearing off, topping, consuming, and destroying the spring wood and underwood in the said last count mentioned, growing and being in the said last-mentioned close, above supposed to have been committed by the said defendant (x),] the said defendant by leave of the court here, for this purpose first had and obtained, according to the form of the statute in such case made and provided, says, that the said plaintiff ought not to have or maintain his aforesaid action against him, because he says, that [the said close in the said first count of the said declaration mentioned, and in which, &c. and the said close in the said last count of the said declaration mentioned, and in which, &c. now are and at the said several times when, &c. were one and the same close, and not other or different closes (z). And the said defendant further saith, that]

(w) See the forms referred to in Com. Dig. Pleader, 3 M. 29.—Thomp. Ent. 804.—Wentw. 58.—Winch. 996, or 1110 ed. 1680.—Lutw. 1857, and 2 Saund. 284. As to the law, 1 Taunt. 529.—See Com. Dig. Pleader, 3 M. 29.—Vin. Ab. "*Fences*."—Ante, 780.—2 Saund. 285, note 4.—2 B & C. 811, 12.

(z) The enumeration of these trespasses intended to be justified, must depend on the statements in the declaration, and in some cases may be wholly unnecessary.

(y) As to the allegation that the trespasses

are one and the same, see ante, vol. 1. Index "*Pleas in Trespass*."—Plead. A. 430, &c.—1 Marsh. Rep. 18.

(z) This mode of pleading is objectionable on special demurrer, but in some cases it may be advisable to adopt it; see note y.

(a) It is sufficient in trespass to say, that the defendant was possessed, but not so in a plea in bar in replevin, 1 Saund. 346, n. 2.—2 Id. 284, and n. 8.—Com. Dig. Pleader, 3 M. 29.—Ante, 1058.

the said defendant before and at the said several times when, &c. was lawfully possessed of a certain close called — (b), with the appurtenances, situate and being in the parish aforesaid, in the county aforesaid, and contiguous and next adjoining to the said close of the said plaintiff in which, &c.; and that the said plaintiff and all other the tenants and occupiers of the said close, in which, &c. for the time being, from time whereof the memory of man is not to the contrary, have repaired and amended, and have used and been accustomed to repair and amend, and of right ought to have repaired and amended, and the said plaintiff before and at the said several times when, &c. of right ought to have repaired and amended, and still of right ought to repair and amend the hedge and fence between the said close of the said defendant and the said close, in which, &c. when and as often as occasion hath required, and shall or may require; to prevent cattle lawfully (d) feeding and depasturing, or being in the said close of the said defendant from erring or escaping thereout, through the defects and insufficiency of the said hedge and fence into the said close, in which, &c. and doing damage there. And the said defendant further saith, that the said hedge and fence, before and at the said several times when, &c. were ruinous, prostrate, fallen down, and in great decay for want of needful and necessary making, repairing, and amending thereof. By means whereof the said cattle in the [said first and last counts of the] said declaration mentioned at the said several times when, &c. then lawfully feeding and depasturing in the said close of the said defendant without the knowledge of the said defendant, and against his will, erred and escaped thereout, into the said close, in which, &c. through the defects and insufficiency of the said hedge and fence, and eat up (e), trod down, depastured, consumed, and spoiled a little of the grass there growing, and eat up, trod down, depastured, tore up, eat off, pulled up, plucked off, consumed, spoiled, bit off, topped, and destroyed a little of the spring wood and underwood there also growing, in the said first and last counts respectively mentioned and in passing through the said hedge and fence, the said cattle at the same time when, &c. in the said first count mentioned, necessarily and unavoidably a little broke down, threw down, and destroyed the same, leaving the said hedge and fence in the said [first count of the said] declaration mentioned. And on the occasions aforesaid, the said defendant at the said several times when, &c. as soon as he had notice (f) of the said cattle having escaped into and being in the said close, in which, &c.

TO REAL PROPERTY

DEFECT OF FENCES.

Liability of plaintiff to repair fences of locus in quo (c).

[\*1105]

Fence out of repair.

Whereby the cattle escaped.

Defendant's entry to turn out the cattle.

(b) Or if it has no name, set out the abutment, as ante, 868.

(c) In the forms in 2 Saund. 284.—Lutw. 1367, a prescriptive obligation to repair is laid in a *que estate* in the plaintiff, and according to Yelv. 74, 76.—Com. Dig. Pleader, 8 V. 29.—Vin. Ab. Fences, E.—Dyer, 865 a, 31.—1 T. R. 766.—Cro. Jac. 665, this was formerly considered necessary; but there are several precedents where the obligation is merely stated to be on the occupier for the time being, Camp. Ent. 304.—9 Went. 58; and see Com. Dig. Pleader, 8 M. 29, and 8 T. R. 768, and according to the last case, as the plaintiff is presumed to be ignorant of the nature of the defendant's obligation, it is clearly sufficient in a declaration to state that the defendant, as occupier, was bound to repair, without stating

an immemorial liability; and the principle of that rule appears equally to apply to a *plea*, and if so, it would suffice to lay the obligation to repair even more generally than in the above form, see ante, 780, n.

(d) This allegation is not usually inserted in the precedent, see 2 Saund. 284, but the party is only bound to fence against cattle being lawfully in the adjoining close, Vin. Ab. Fences, B. 1.—2 Hen. Bla. 527.

(e) This averment must depend on the statements in the declaration.

(f) If the defendant suffered the cattle to remain in the close after notice, he will be liable as a trespasser, 2 Saund. 285, n. 4.—Com. Dig. Pleader, 8 M. 29.—2 Leon. 93. But this is properly the subject-matter of a replication, &c. 2 Saund. 285, n. 4.

TO REAL  
PROPERTY

DEFECT OF  
FENCES.

as aforesaid, entered into the said close, in which, &c. to drive, and did then and there "drive (g), the said cattle from and out of the said close in which, &c. into the said close of the said defendant, and in so doing he the said defendant, at the said several times when, &c. did necessarily and unavoidably with his feet in walking (h), tread down, trample upon and spoil a little of the grass there also growing, doing no unnecessary damage to the said plaintiff on the occasions aforesaid, and as he lawfully might for the cause aforesaid; which are the said several supposed trespasses in the introductory part of this plea mentioned, and whereof the said plaintiff hath above complained against him the said defendant." And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

LICENSE.

(i)

Leave and  
license.

And for a further plea in this behalf, the said defendant by leave, &c. says, (*actio non, as ante, 906, third form.*)—Because he says, that he the said defendant at the said several times when, &c. by the leave and license of the said plaintiff to him for that purpose first given and granted, to wit, at, &c. (*venue*) aforesaid, committed the said several supposed trespasses in the said declaration mentioned: as he lawfully might for the cause aforesaid.—And this, &c.—[*Conclude with a verification as ante, 907, sixth form.*]

RIGHTS OF  
FISHERY.

Second  
plea to  
trespass  
for fishing  
in a several  
fishery that  
locus in quo  
was defend-  
ant's free-  
hold (k).

[\*1107]

[*First plea, general issue, as ante, 1061; second plea, as follows:*]—And for a further plea in this behalf, [as to the fishing in the said fishery in the said first count mentioned, and the said fish there found and being catching, seizing, taking, and carrying away, and converting and disposing "thereof to his own use,] (l) the said defendant, by leave of the court here, for this purpose first had and obtained, according to the force of the statute in such case made and provided, says, that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says, that the place in which the said supposed several fishery now is, and at the said several times when, &c. was a certain close or piece or parcel of land covered with water, and which said close or piece or parcel of land now is, and at the said several times when, &c.

(g) The defendant may justify entering to recharge cattle that escaped for want of fencing, 2 Roll. Ab. L. 35, 40.—Com. Dig. Pleader. 8 M. 29.

(h) This averment should correspond with the statements in the declaration.

(i) As to this plea in general, see ante, vol. i. Index, "*License*."—Com. Dig. Pleader, 8 M. 35.—Vin. Ab. License—8 East, 308.—4 M. & S. 562.—1 B. & C. 684.—4 East, 107, and the precedents, 9 Wentw. Index, lxxxv. xciii.—Plea. Ass. 422.—Lil. Ent. 426. In trespass a license must be pleaded, and cannot be given in evidence under the general issue, 7 T. R. 188.—2 Taunt. 156.—Hob. 174, 5, but see 1 Hen. 7, 28, a. *per* Rede J. *contra*. Fighting being a breach of the peace, and unlawful, the consent of the plaintiff to fight would be no bar to his action, Bul. N. P. 18. If A. license B. to beat him, it is against the peace, and therefore void, Amb. 218, *sed quare*, if the defendant might not plead a license in such case except as to what is against the peace. It has been usual, in the introductory part of the plea, to enumerate all the trespasses, which in point of law and in fact, may be justified by the license, but this is seldom ne-

cessary. As to the evidence and replication see 11 East, 451. As to replication of count mand, see 2 Saund 118, 5th ed.—8 Taunt. 8.—8 East, 308.—5 B. & C. 221.—7 D. & 783, S. C.

(k) As to pleas in general in trespass fisheries, see ante, vol. i. Index, "*Plea in Trespass*."—Co. Lit. 122 a. 126 b, note 7 127 a, b.—Com. Dig. Piscary.—9 Wentw. Index, xliii.—Boote's Suit at Law, 193 to 264.—Plead A. 401, 445.—5 Burr. 2162.—4 T. 487.—See form of a plea justifying under grant of a liberty and privilege of hunting game, with dogs, &c. 4 B. & C. 639.—7 D. R. 49, S. C. The plea of *liberum tenementum* to trespass for fishing in a several or fishery, is good, see Year Book, 18 Edw. iv. c. 1, and though the subject-matter of it may be given in evidence under the general issue, the plea is sometimes useful, to compel the plaintiff to set forth in his replication his supposed right by prescription or grant.

(l) This enumeration of the trespasses intended to be justified, must depend on the statements in the declaration, and in many cases may be wholly unnecessary.



and freehold of the said defendant; wherefore the said defendant at the said several times when, &c. entered into the said close, piece, or parcel of land, and fished there for fish, and the said fish in the said [first count of the said] declaration mentioned, there found and being, caught, seized, took, and carried away, and converted and disposed thereof to his own use, as it was lawful for him so to do for the cause aforesaid; which are the said several supposed trespasses in the introductory part of this plea mentioned, and whereof the said plaintiff hath above complained against him the said defendant. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

TO REAL  
PROPERTY.  
—  
RIGHTS OF  
FISHERY.

And for a further plea in this behalf, [as to the said supposed trespasses in the introductory part of the said second plea mentioned, and there- in justified. (n),] the said defendant by like leave, &c., (*actio non, as in the former plea.*)—Because he says, that the said fishery in the said [first count] mentioned, and in which, &c. now is, and at the said several times when, &c. was the several fishery of the said defendant; wherefore the said defendant at the said several times when, &c. being seasonable times of the year for that purpose, fished in the said fishery in the said [first count] mentioned, and the said fish in the said [first count] mentioned, there found and being, caught, seized, took, and carried away, and converted and disposed thereof to his own use; as it was lawful, &c.—[*As in the former plea, to the end.*]

8dly. That the fishery was the defendant's several fishery (m).

—[*Fourth plea, same introduction as the above.*]—Because he says, that the said defendant before and at the said several times when, &c. in the said [first count of the said] declaration mentioned, was and still is seized in his demesne as of fee, of and in divers, to wit, two thousand acres of land, with the appurtenances, situate, and being in the parish aforesaid, and that the said defendant and all those whose estate he now hath, and at the said several times when, &c. had, of and in the said land, with the appurtenances, from time whereof the memory of man is not to the contrary, have had, and have been used and accustomed to have, and of right ought to have had, and the said defendant still of right ought to have, a free fishery in the said fishery in the said first count mentioned, in which, &c. and during all the time aforesaid fished and have been used and accustomed to fish, and of right ought to have fished, and still of right ought to fish in the same fishery for fish every year, at all seasonable times of the year for fishing, at his and their free will and pleasure, and to take and carry away the fish from time to time caught by them therein, as belonging and appertaining to the said land, with the appurtenances. Wherefore the said defendant, at the said several times when, &c. in the said [first count] mentioned, the same being seasonable times of the year for that purpose, fished in the said fishery in this plea mentioned, and in which, &c. And the said fish in the said [first count] mentioned, there found and being, took and carried away, and converted and disposed thereof to the use of the said defendant as he lawfully, &c.—[*Same conclusion as in the second plea, ante, 1107.*]

[\*1108] 4thly. Plea that the defendant has a free fishing in the fishery.

The plea of common fishery is precisely similar to the former plea of 5thly. Common

(m) See a form of a claim of a right of fishing by prescription, Lil. Ent. 449.

(n) See note l. in the preceding page.

(o) A common of fishery is not correctly

described by saying "a common fishery," 2 Moore, 83.—8 Taunt. 183, S. C.—As to evidence under this plea, I.L. 188.

of fishery (o).

TO REAL free fishery, inserting the words "common of fishery," instead of the words PROPERTY. "free fishery."

RIGHTS OF FISHERY.

6thly. *Locus in quo* a navigable river, and all the king's subjects have right to fish therein.

[*Same introduction as in the plea, ante, 1106.*—Because he says, that the said supposed fishery, in which, &c. at the said several times when, &c. was and still is, and from time immemorial hath been, part and parcel of the said river, called the, &c. and that the said part thereof, in which, &c. now is, and at the said several times when, &c. was, "and from time whereof the memory of man is not to the contrary, hath been a public and common navigable river, in which the tides and waters of the sea during all the time aforesaid, have flowed and reflowed, and that in the said part of the same river called the, &c. in which, &c. every subject of this realm at the said several times when, &c. of right had, and of right ought to have had and still hath, and of right ought to have, the liberty and privilege of fishing. Wherefore the said defendant being a subject of this realm at the said several times when, &c. entered into the said fishery, in which, &c. so being part of the said navigable river as aforesaid, where the tides and waters of the sea flow, to fish in the said river there, at the said several times when, &c. being seasonable times of the year for such fishing, and at those several times did fish there, as it was lawful, &c.—[*Conclude as in the plea, ante, 1107.*]

RIGHTS OF COMMON.

Justification by a freeholder and his servant, under a prescriptive right of common of pasture (p).

[*First plea, general issue, as ante, 1061: second plea, as follows:*—And for a further plea, in this behalf, as to (*enumerating, if necessary, the trespasses proposed to be justified, and which must depend on the averments in the declaration, which in the cases on which the following plea was framed, were the entry on the land, and putting on cattle, and filling up ditches, breaking down fences, &c.*) the said defendants, by leave of the court here, for this purpose first had and obtained, according to the form of the Statute in such case made and provided, say that the said plaintiff ought not to have or maintain his aforesaid action, because they say, that before, &c. [*Here state the seisin in fee, and prescriptive right of common in the defendant, as ante, 1059, observing the notes, or if the defendant be a tenant, after stating the seisin in fee and the right of common in freeholder, set forth the demise, as ante, 549 or 1058, and then proceed as follows:*—Wherefore the said C. D. in his own right, and the said E. F. as his servant, and by [*\*1110*] his command, at the said times when, &c. entered into the "said close in which, &c. in order to turn and put (q), and did then and

(p) See the form referred to, 9 Wentw. Index, xlv. to l.—2 Rich. C. P. 53.—See also the forms, Rast. Ent. 658.—1 Saund. 222.—7 B. & C. 346; and the notes to 1 Saund. 389 to 346, 347 to 358.—2 Saund. 1 to 6, and 324 to 329.—Com. Dig. Pleader, 8 K. 24; Common; and Woolrich on Commons, as to the mode of pleading rights of common in general, see also the form and notes, ante, 1059, 799, &c. If the right of common be qualified either for a limited number or a particular description of cattle, or at particular times of the year, or if the defendant have any land in the *locus in quo*, the plea must be framed accordingly, see the notes, ante, 1059. As to the necessity of shewing a seisin in fee, and pleading the right in a *que* estate, see 3 You & Jerv. 93.—Co. Lit. 113 b. 4 T. R. 718.—Cro. Car. 539.—

Ante, 1659. If there be any reason to apprehend that the prescriptive right of common may have been extinguished by unity of seisin it is proper to add a plea claiming the right of common by non-existing grant, as in the plea of a right of way by grant, post, 1122. See a replication that the *locus in quo* had been inclosed from the common thirty years, 2 B. & C. 918. 4 D. & R. 572, S. C.—2 Tnant. 159. But *semble* that the general replication that the *locus in quo* was not parcel of the waste, will, in ordinary cases, suffice; — r. Smith and others, Trinity Term, 1825, (Bond, attorney;) and in 7 B. & C. 346, it was held, there was no occasion to reply specially a custom to inclose.

(q) This allegation seems proper, 1 Rol. Abr. 406. l. 8.—Com. Dig. Common, H.

here turn and put into and upon the same the said cattle, horses, &c. (name them as they are named in the declaration) in the said [first count of the said] declaration mentioned, being the said C. D.'s own commonable cattle *levant and couchant* in and upon the said last-mentioned land, with the appurtenances, to use † the said common of pasture of the said C. D. there, and in so doing they the said C. D. and E. F. at the said times when, &c. with their feet in walking, necessarily and unavoidably trod down (r), trampled upon, spoiled, consumed and destroyed a little of the grass and hay, herbs, roots, shrubs, and bushes there growing and being, and with the said cattle, horses, &c. in the said [first] count mentioned, necessarily and unavoidably trod down, trampled upon, spoiled, set up, depastured, consumed, and destroyed a little other of the grass and hay, herbs, roots, shrubs, and bushes there also growing and being; and because the said close, in which, &c. before and at the said time when, &c. had been and was wrongfully inclosed with and by means of the said ditches and fences and gates (r) in the said [first count of the said] declaration mentioned, before then wrongfully dug and made, and put and placed in and upon the said close, in which, &c. so that without filling up and levelling the said ditches and fences, and removing the said gates, the said C. D. could not use or enjoy his said common of pasturo in, upon, and throughout the said close, in which, &c. in so ample and beneficial a manner as he otherwise might and would and ought to have done, he the said C. D. in his own right, and the said D. F. as the servant of the said C. D. and by his command, at the said several times when, &c. with the said pickaxes, (r), hatchets, saws, mattocks, and other instruments in the said [first count] mentioned, filled up and levelled the said ditches, and dug up, threw down, and prostrated the said fences and gates in the said [first] count mentioned, and took and carried the said gates to a small convenient distance, where they left the same for the use of the said plaintiff, doing no unnecessary damage to the said plaintiff on the occasions aforesaid, and as they lawfully might, for the cause aforesaid, which is the said several supposed trespasses in the introductory part of this declaration mentioned, whereof the said plaintiff hath above complained against the said C. D. and E. F. And this, &c.—[Conclude with a verification, ante, 907, sixth form.]

TO REAL PROPERTY.

RIGHTS OF COMMON.

Because the common was wrongfully enclosed by the ditches &c. defendant prostrated the same (r).

[First plea, general issue, as ante, 1061; second plea, enumerate the trespasses intended to be justified, as directed \*in the form, ante, 1109, and as by leave, &c. *actio non*, &c. as ante, 906.]—Because he says, that the said close called — in which, &c. at the said times when, &c. lay, and from time immemorial hath lain, and still doth lie, contiguous and next adjoining to a certain other close, or piece or parcel of land called — containing divers, to wit, — acres of land, situate and being in a certain part of the said parish of — which lies in the county of — and which hath been separated or divided from the said last-mentioned close by — in the said county of — by any inclosure, hedge, or fence

DEFECT OF FENCES.

Common pur cause de vicinage (t) [\*1114]

(r) Let this agree with the statements in the declaration in this respect.

(s) A commoner may justify abating a fence lawfully erected upon a common, but not one planted thereon, 6 T. R. 487.—2 Mod. Com. Dig. Common, H.—7 B. & C. 346.

(t) See the notes to the precedent, ante, 1109, and Com. Dig. Common, E. Common pur cause de vicinage being merely an excuse for a trespass with cattle, and defendant cannot justify pulling down fences, &c. Com. Dig. Common, E.

TO REAL  
PROPERTY.DEFECT OF  
VENUE.

whatsoever, sufficient to prevent cattle from time to time feeding and depasturing in the said close called — in the said county of — from erring or escaping therefrom into the said close called — in which, &c. And that the said cattle, from time to time, during all that time, duly put in the said close called — to feed on the grass there then growing, (*or*, “to use the said common of pasture in and upon, and throughout, &c.”) from time immemorial have gone, escaped, and rambled, and have been used and accustomed to go, escape, and ramble therefrom into the said close called — in which, &c. and to intermix there, and feed with cattle from time to time, feeding on the grass growing in the said last-mentioned close; and in like manner the cattle from time to time, during all that time, duly put into the said close called — in which, &c. to feed on the grass there then growing, (*or*, “to use the said common of pasture in and upon, and throughout, &c.”) from time immemorial have gone, escaped and rambled, and have been used and accustomed to go, escape and ramble therefrom into the said close called — in the said county of — and to intermix there, and feed with cattle from time to time feeding on the grass growing in the said last-mentioned close. And the said defendant further saith, that the said close called — in the said county of — before and at the said time when, &c. was the close, soil, and freehold of one E. F. and that the said cattle of the said defendant, in the said declaration mentioned, just before the said time when, &c. to wit, on the same day and year aforesaid, were in and had been put into the said close called — in the said county of — to feed on the grass there then growing, by the leave and license of the said E. F. to the said defendant, in that behalf first given and granted, to wit, at the parish aforesaid, in the county aforesaid; and the said defendant further says, that the said cattle, so being put and being in the said close called — in the said county of — as aforesaid, for the purpose aforesaid, and the said close called — in which, &c. so being and lying contiguous thereto, and not separated or divided therefrom by any inclosure, hedge, or fence whatsoever, the said cattle of him the said defendant afterwards, and just before the said time when, &c. to wit, on the same day and year aforesaid, of their own accord, and without the knowledge or consent of the said defendant, went, escaped, and rambled from and out of the said close called — in the said county of — into the said close called — in which, &c. and intermixed and fed with the cattle there then feeding on the grass there then growing, and remained and continued in the said close called — in which, &c. on the occasion aforesaid, without the knowledge of the said defendant, and there eat, &c.—[*Here justify the trespasses with the cattle, as in the form, ante, 1110, and conclude as therein directed.*]

Common  
of estovers,  
&c. (u).

[*First plea, general issue, as ante, 1061; second plea, as follows:*]— And for a further plea in this behalf as to, &c. [*state the entry on foot and with carriages, throwing down of posts and fences, &c. and other trespasses which may be justified, and then say, by leave, &c. actio non, &c. as ante,*

(u) See the notes to the form, ante, 807, 485.—9 B. & C. 671, and ante, 807, and of Thomp. Ent. 877. See the forms of pleas of right to dig stones, or sand, 6 T. R. 742 common of Turbary, 7 East, 121.—1 Taunt. Plead A. 499.

TO REAL  
PROPERTY.  
—  
RIGHTS OF  
COMMON.

907, and then as follows :]—because he says, that the said close, in which, &c. before and at the said several times when, &c. had divers large quantities of bushes and underwood growing thereon ; and the said defendant further saith, that he the said defendant before and at the said several times when, &c. was seized in his demesne as of fee, of and in a certain messuage, with the appurtenances, situate and being in the parish aforesaid, and that he the said defendant and all those whose estate he now hath, and at the said several times when, &c. had, of and in the said last-mentioned messuage, with the appurtenances, for the time being, from time whereof the memory of man is not to the contrary, have had and taken, and been used and accustomed to have and take, and of right ought to have had and taken, and the said defendant still of right ought to have and take, reasonable estover of the bushes and underwood \*stand- [\*1116] ing and growing in and upon the said close, in which, &c. and to carry the same from thence to the said messuage, with the appurtenances, to be burnt, spent, and consumed for fuel therein every year, and at all seasonable times of the year, at his and their free will and pleasure, as belonging and appertaining to such last-mentioned messuage, with the appurtenances. Wherefore he the said defendant at the said several times when, &c. having occasion for such reasonable estovers as aforesaid, to be burnt and consumed for fuel in the said last-mentioned messuage, at the said several times when, &c. being seasonable times of the year in that behalf, entered the said close, in which, &c. with the said cattle and carriages in the said declaration mentioned, in order to take and carry such reasonable estovers as aforesaid, from thence to the said last-mentioned messuage to be burnt, used, and consumed for fuel therein ; and the said defendant on those occasions with his feet in walking, and by and with the said cattle and carriages, a little trod down, trampled upon, consumed, and spoiled the grass and herbage then growing and being in the said close, and subverted, damaged, and spoiled the soil of the said close, and because the said stakes, banks, mounds, gate-posts, and other posts in the said declaration mentioned, before the said several times when, &c. had been wrongfully erected, and were then standing and being in and upon the said close, in which, &c. and partly inclosing the same, so that without some digging up, pulling up, tearing up, breaking down, throwing down, prostrating, and destroying the said banks, mounds, and fences, gate-posts, and other posts respectively, the said defendant could not then have, take, and carry from the said close such reasonable estovers as aforesaid, to be burnt, used, and consumed for fuel in the said last-mentioned messuage, as he otherwise might and ought to have done ; he the said defendant at the said several times when, &c. in order to remove such obstructions as last aforesaid, dug up, tore up, broke down, threw down, prostrated, and destroyed, the said stakes, banks, mounds, fences, gate-posts and other posts in the said declaration mentioned, and took and carried the said gate-posts, and other posts to a small and convenient distance, where he left the same for the use of the said plaintiff ; doing no unnecessary damage to the said plaintiff on those occasions, which are the same supposed trespasses in the introductory part of this plea mentioned, and whereof the said plaintiff hath above complained against the said defendant. And this, &c.—[ *Conclude with a verification, as ante, 907, sixth form.* ]

TO REAL  
PROPERTY.PUBLIC  
WAYS.Public  
way for  
carriages,  
&c. (w).

[\*1117]

Enumeration  
of the  
trespass  
intended to  
be justified.The public  
way (y).

[\*1118]

Wherefore  
defendant  
entered,  
and the  
cattle by  
stealth and  
morsels eat  
the grass  
in the way.Because  
the fences,  
&c. ob-  
structed  
the way,  
defendant

[First plea, general issue, as ante, 1061; second plea, as follows:—]

And for a further plea in this behalf, [as to the entering the said close of the said plaintiff, in the said first count of the said declaration mentioned, and in which, &c. and with feet in walking, and with the said cattle and carriages in the said declaration mentioned, treading down, trampling upon, crushing, consuming, and spoiling the grass and herbage then growing and being in the said close, and subverting, damaging, and spoiling the soil of the said close, and digging up, pulling up, tearing up, prostrating, and destroying the said stakes and posts in the said first count mentioned, and with the said cattle in the said declaration mentioned, eating up and depasturing the said other grass of the said plaintiff, there also growing and being, and also to the breaking down, throwing down, prostrating, and destroying the said banks, mounds, and fences, in that count mentioned, and also as to digging up, pulling up, prostrating, damaging, and destroying the said gate-posts and other posts in the said last count in the said declaration mentioned, and taking and carrying away the same, above supposed to have been done by the said defendant (x),] he the said defendant, by leave of the court here, for this purpose first had and obtained, according to the form of the Statute in that case made and provided, saith, that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says, that "before and at the said several times when, &c. there was, and of right ought to have been, certain common and public highway, into, through, over, and along the said close in which, &c. for all the liege subjects of our lord the king, to go, return, pass, and repass on foot, and with cattle and carriages; "at all times of the year (z), at their free will and pleasure. Wherefore the said defendant being a liege subject of our said lord the king, and having occasion to use the same way, at the said several times when, &c. went, passed, and repassed on foot, and with the said cattle and carriages (a), into, through, over, and along the said close, in which, &c. in, by, and along the said highway there, using the same as he lawfully might for the cause aforesaid.† And in so doing the said defendant with his feet in walking, and with the said cattle and carriages unavoidably a little trod down (a), trampled upon, consumed and spoiled the grass and herbage then growing and being in the said close, in which, &c. and subverted, damaged, and spoiled the soil of the same close, and the said cattle, at the said several times when, &c. in passing and repassing along the said way, by stealth and morsels, and against the will of the said defendant, eat up and depastured a little other of the grass there then growing in the said way. And because the said stakes (a), banks, mounds, fences, gate-posts, and other posts in the said declaration mentioned, before the said several times when, &c. had been wrongfully erected, and were then standing in and

(w) See forms, A Wentw. Index, lvi. 1 Hen. Bla. 351.—Lil. Ent. 426. In pleading a public way, it is not necessary to state the termini, or to show that it was immemorially a way, the term "public highway" being sufficient, 1 Hen. Bla. 351, 355.—2 Saund. 158 d.—Ante, 308, note.—3 East, 6. —3 T. R. 265.—3 Id. 608. 8 Burn, J. 26th ed. 68. See a form of right of way by inhabitants of a town, Lutw. 1507.

(z) The enumeration of the trespasses intended to be justified, must depend on the

statements in the declaration, and in most cases may be wholly unnecessary.

(y) If the right of way be qualified, it must be described accordingly, 4 Campb. 190; as if the way be merely a foot-way, or only a horse-way; or if it be to be used only at particular times, see 8 Burn, J. 26th ed. 67, 68, and cases there collected.

(z) See note x, ante.

(a) This must depend on the statement in the declaration.

across the said highway, and obstructing the same, so that without digging up, pulling up, tearing up, breaking down, throwing down, prostrating and destroying the said stakes, banks, mounds, fences, gate-posts, and other posts respectively, the said defendant could not then pass and repass with the said cattle and carriages, into, through, over, and along the said close, in which, &c. in the said highway there, as he ought to have done, the said defendant at the said several times when, &c. in order to remove the said obstructions, dug up (a), pulled up, tore up, broke down, prostrated and destroyed, the said stakes, mounds, fences, gate-posts, and other posts in the said declaration mentioned, and took and carried the said gate-posts and other posts to a small and convenient distance, and there left the same for the use (b) of the said plaintiff, doing no unnecessary damage to the said plaintiff on those occasions, which are the same supposed trespasses in the introductory part of this plea mentioned, and whereof the said plaintiff hath above complained against him the said defendant. And this, &c.—[Conclude with a verification, as ante, 907, sixth form.]

TO REAL  
PROPERTYPUBLIC  
WAYS.

prostrated same and carried materials to a convenient distance.

And for a further plea in this behalf, as to the breaking and entering the said close, &c. [if necessary, enumerate the trespasses stated in the declaration and intended to be justified] the said defendant by leave, says, &c. [actio non, as ante, 906,] because he says, that before and at the said time when, &c. and on the several other days and times in the said declaration mentioned, there was, and of right ought to have been, a certain common and public highway running by and lying close to, and adjoining the said close of the said plaintiff, in which, &c. in the said first count mentioned, for all the liege subjects of our lord the king, to go, return, pass, and repass on foot and with horses, mares, and geldings, and other cattle, and with wagons, carts, and other carriages, at all times of the year, at their free will and pleasure. And the said defendant further saith, that he the said defendant being a liege subject of our said lord the king, was desirous and had occasion and was about to go and pass, and did endeavor to go and pass in, through, over, and along the said common and public highway, with the said wagons and carts drawn by the said mares, mares, and geldings, in the said first count of the said declaration mentioned, but a great part, to wit, [ten yards] in length, and [ten yards] in breadth, of the said common or public highway, was then and there so miry, deep, foundurous, ruinous, and in such bad state and condition, as he wholly impassable by the said defendant with his said wagons and carts, and horses, mares, and geldings, as by other liege subjects of our said lord the king; and because the said close of the said plaintiff in which, &c. in the said first count mentioned, so lying contiguous and next adjoining the said common and public highway as aforesaid, was the most commodious and necessary way for him the said defendant to break out of the said highway so miry, deep, foundurous, ruinous, and in such bad state and condition as aforesaid, to go and proceed towards B. in that county aforesaid, with the said wagons and carts, and with the said horses,

Plea, justifying defendant's entering plaintiff's close, and breaking gates, &c. because a highway adjoining the close was out of repair, and continued impassable wherefore defendant, through necessity, entered, &c. (c).

(a) This must depend on the statements in the declaration.

see the form of replication, post, 1207.

(b) This is not traversable, see 4 T. R. 864. Stark. C. N. P. 178.—Ante, 1094, and

(c) As to this plea, see 2 Show. 20.—2 Lev. 284, S. C.—1 Ld. Raym. 749.—3 Burn, J. 26th edit. 7.

TO REAL  
PROPERTY.PUB-  
LIC  
WAYS.

mares, and geldings, he the said defendant, at the said time when, &c. with the said carts and wagons, and the said horses, mares, and geldings, did necessarily and unavoidably, and in order to proceed forward and towards B. aforesaid, a little break out of the said, &c. part of the said highway so miry, &c. as aforesaid, and enter, and go, and pass over that part of the said close of the said plaintiff in which, &c. in the said first count mentioned, which lay close to and immediately adjoining the said common or public highway, so being in such a state and condition as aforesaid, as it was lawful for him to do for the cause aforesaid, and in so doing he the said defendant with feet in walking, did a little break down, trample in, and consume and spoil a little of the grass and corn then and there growing and being, and with the feet of the said horses, mares, and geldings, and also with the wheels of the said carts and wagons did necessarily and unavoidably a little crush, damage, and spoil a little other the grass and corn of the said plaintiff then and there also growing and being, and with the feet of the said horses, mares, and geldings, and with the wheels of the said carts and wagons, a little trampled, damaged, and spoiled the earth and soil of the said plaintiff in the said part of the said close so lying close to and immediately adjoining the said common or public highway as aforesaid, and then did then and there necessarily and unavoidably a little cut down and destroy, prostrate and level, a little of the trees and underwoods, hedges, gates and fences, in the said last part of the said close there growing, erected, and being, doing on those occasions no unnecessary damage to the said plaintiff, which were the same supposed trespasses in the introductory part of this plea mentioned, and whereof, &c. the said plaintiff hath above complained against him. And this &c.—[*Conclude with a verification, as ante, 907, sixth form; add another plea, as ante, 1116.*]

PRIVATE  
WAYS.

Private  
way by  
prescrip-  
tion by a  
freeholder  
(d).

[ \*1119 ]

[*First plea, general issue as ante, 1061: second plea, same as the form ante, 1117, to the asterisk, mutatis mutandis, \*and then proceed as follows:*—And the said defendant further saith, that he the said defendant, long before, and at the said several times when, &c. was, and still is, seized of his demesne as of fee (e), of and in a certain close called —, contiguous and next adjoining to the said close, in which, &c. and that he the said defendant and all those whose estate he now hath, and at the said several times when, &c. had of and in the said close called —, from time whereof the memory of man is not to the contrary, have had and used, and have been accustomed to have and use, and of right ought to have had and used, and the said defendant at the said times when, &c. of right ought to have had and used, and still of right ought to have and use, a certain way (f) for himself and themselves, and his and their servants, farmers, and tenants, occa-

(d) See forms and law, Lutw. 1426, 7, 1527. —16 East, 848.—2 Rich. C. P. 49, 52.—Lil. Ent. 72; and ante, 807 to 814; and by a rector, see Willes, 288. As to the mode of pleading a private right of way in general, see Com. Dig. Chimin, Dig. d. 2, &c. Vin. Ab. Chimin, Private, H. Bac. Ab. Highways, C. The termini and course of a private way, must be stated in pleading, Id. ibid.—1 Hen. Bl. 851, 855.—1 East, 877. *Quære*, if the way can be described as leading “*towards*, &c.”

1 East, 877; but *semble*, that where the way leads over other grounds of the defendant, facts must be stated; ante, vol. ii. p. 808.

(e) As to the necessity of pleading in a fee estate, and showing a seisin in fee, see 3 Ye. & Jerv. 98, and cases there cited; and ante, 1059, 1060.

(f) Add another plea, varying the statement of the right of way, if there be any doubt as to the precise nature of it.



piers (g) of the said close called —, to pass and repass on foot, and with horses, mares, geldings, and other cattle, from a certain common king's highway, in the parish of — aforesaid, unto, into, through, over, and along the said close of the said plaintiff called —, in which, &c. unto and into the said close of the said defendant, and so from thence back again unto, into, through, and over and along the said close of the said plaintiff called —, in which, &c. unto and into the said common king's highway, at all times of the year (h) at his and their free will and pleasure, as to the said close of the said defendant, with the appurtenances belonging and appertaining (i). And the said defendant being so seized of his said close, and also being in the possession thereof (k), and having occasion to use the said way, did with his servants and horses, and mares and geldings, and cattle, at the said several times when, &c. pass and repass, in, by, through, and along the said way, from the said common king's highway, into through, over, and along the said close of the said plaintiff called —, in which, &c. unto and into the said close now of the said defendant, and so from thence back again, in, by, through, and along the said way, unto and into the said common king's highway, using the said way there for the purpose and on the occasion aforesaid, as he lawfully might for the cause aforesaid, and in so doing, &c.—[Same as the form, ante, 1118, from the † to the end, justifying the trespasses, according to the facts, observing the introductory part of this plea.]

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WAYS.

[\*1120]

[State a seisin in fee, as ante, 1119.]—And that he the said C. D. and all those whose estates he now hath, and at the said several times when, he had, of and in the said messuage, farm, and lands, from time whereof the memory of man is not to the contrary, have had and used, and have been accustomed to have and use, and of right ought to have had and used, and the said C. D. at the said several times, when, &c. of right ought to have had and used, and still of right ought to have and use, a certain way for himself and themselves, and his and their servants, farmers, and tenants, occupiers of the said messuage, farm, and lands, to pass and repass on foot, from a certain close in the parish aforesaid, near to a certain common king's highway, in the same parish, into, through, over, and along the said closes in which, &c. towards the said messuage, farm, and lands, now of the said C. D. and back again, unto, into, through, over, and along the said closes in which, &c. unto and into the said close [in this plea mentioned], towards the said common king's highway, at all times of the year, at his and their free will and pleasure, as to the said messuage, farm and lands, of the said C. D. with the appurtenances belonging and appertaining; and the said C. D. being so seized of the said messuage, farm and lands, and also being in the possession thereof, the

Prescrip-  
tive right  
of way  
where de-  
fendant  
has closes  
at both  
ends of  
way (l).

(g) A landlord comes within the meaning of the word, though he only occupies by his lease, 2 D. & R. 81.—1 B. & C. 8, S. C. and 16 East, 343.

(h) If the right of way be qualified as to time of enjoyment or otherwise, it should be described accordingly, see 4 Camp. 190.

(i) The several forms in Lutw. 1426, 1427, 1119.—Lil. Ent. 426.—1 B. & P. 371, concerning this allegation, but see Yelv. 160.—Ante, 1118, n.—Lutw. 1527. East. Ent. 617 a, b; 1118 a, b.—Lil. Ent. 452.—1 East, 877.—1

Hen. Bla. 351.

(k) This, though not usual, is said to be improper, when a seisin in fee is alleged, as in this form, possession being an intendment of law when a seisin is laid, 16 East, 343.—4 M. & S. 392.

(l) See 1 East, 377. This form is merely suggested as perhaps expedient to be resorted to where the defendant was seized of closes at each end of the way, and of course cannot prescribe for a way over such closes.—Ante, 1118 a, note d.

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PROPERTY

PRIVATE  
WAYS.

said C. D. in his own right, and the said E. F. "as his servant, and by his command, at the said several times when, &c. did pass and repass on foot, in and by and along the said way from and out of the said close, [in this plea first mentioned], into, through, over, and along the said close of the said plaintiff, in which, &c., towards the said messuage, farms and lands, now of the said C. D. and so from thence back again, in, by, through, and along the said footway towards the said common king's highway, using the said way there for the purpose and on the occasions aforesaid, as they lawfully might for the cause aforesaid, and in so doing, &c.—[Same as the form, ante, 1118, from the † to the end, justifying trespasses, according to the fact.]

Right of  
way by  
non-exist-  
ing grant  
(m).

[\*1123]

[First plea, general issue, as ante, 1061; second plea, prescriptive right of way, as ante, 1118; third plea, as follows:]—And for a further plea in this behalf, [as to the said several supposed trespasses in the introductory part of the said second plea mentioned, and therein justified, the said defendant by-like leave, &c. says, [actio non, as ante, 907, fourth form.] because he says, that he the said defendant, long before and at the said several times when, &c. was, and from thence hitherto hath been, and still is, seised in the demesne as of fee, of and in a certain [close] situate and being in the parish of — aforesaid; and the said defendant further saith, that long before any of the said several times when, &c. he wit, on, &c. (n) at, &c. (venue) aforesaid, by a certain deed made between I. K. (o) the then owner of the said [close], in which, &c. and who was then seised thereof in his demesne as of fee, and L. M. who was then seised in his demesne as of fee of the said [close] now of the said defendant, and whose estate therein he the said defendant now hath, but which deed hath since been lost and destroyed by accident, and therefore cannot be brought into the said court here, and the date whereof is for that reason wholly unknown to the said defendant, the said I. K. so then being owner of the said [close], in which, &c. did grant to the said L. M. so then being the owner of the said [close] now of the said defendant, and to the heirs and assigns of the said L. M. a certain way from [describe the way which may be thus] a certain public king's highway, in the parish aforesaid, into, through, over, and along the said [close], in which, &c. unto and into the said [close] now of the said defendant, and so back again from the said last mentioned [close], into, through, over, and along the said [close] in which, &c. unto and into the said public king's highway, to return, pass and repass on foot, by himself and themselves, and by and their servants, and with horses, mares, and geldings, carts and ca-

(m) See a form, 3 Bing. 115. Where there has been an actual grant of a way by a will, lease, conveyance, or other deed, the plea must be framed accordingly, see 1 B. & P. 891.—3 East, 294.—1 T. R. 561.—See form of plea of a grant by a will, 1 B. & P. 871. In the case of an express grant, insert two pleas or more, one claiming the right of way by express grant, in express terms, and another by a grant "of all ways therewith used, &c." averring that a particular way was used. When there is any reason to apprehend that a prescriptive right of way, may have been extinguished by unity of seisin, it must then be claimed as a way by non-existing grant as in

the above form, and the uninterrupted use of the way for a long time is evidence from which the jury may presume a grant, 3 T. R. 157.—1 Saund. 323 a.—3 East, 294.—1 East 831.—10 East, 55. In 10 East, 55, it was decided that the names of the parties to the supposed grant must be stated. See as to evidence in a plea of right of way by non-existing grant, 3 Bing. 115.

(n) Some day about the time when it can be proved the user of the way first took place and whilst the estates were in possession of some person seised in fee, or his tenant.

(o) The names of the parties must be stated, 10 East, 55.

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PROPERTY.PRIVATE  
WAYS.

riages, in and along the said last-mentioned way, every year, and at all times of the year, at his and their free will and pleasure (p). By virtue of which said grant, the said defendant (q) before and at the said several times when, &c. was and still is entitled to such way as last aforesaid; and the said defendant being so seised and entitled to such way as last aforesaid, he the said defendant at the said several times when, &c. having occasion to use the said way, did, with his servants, and with his said horses, mares, and geldings, carts and carriages, at the said several times when, &c. go, pass, and repass, in, by, through, and along the said way from the said common king's highway, into, through, over and along the said [close] of the said plaintiff in which, &c. unto and into the said [close] now of the said defendant, and so from thence back again, in, by, through, and along the said way, unto and into the said common king's highway, using the said way there, for the purpose and on the occasion aforesaid, as he lawfully might for the cause aforesaid, and in so doing, &c.—[Same as in the form, ante, 1118, from the † to the end, justifying the trespasses, according to the facts, observing the introductory part of the plea.]

[Commencement as ante, 1122.]—Because he says, that at the said several times when, &c. he the said defendant was and still is seized in his demesne as of fee, of and in a certain messuage, and divers, to wit, 70 acres of land, with the appurtenances, situate and being in the parish of, &c. aforesaid. And the said defendant further saith, that long before the said times when, &c. and at the time of the making the grant hereinafter mentioned, one J. P. was seized in his demesne as of fee, of and in the said closes in which, &c. and one P. H. was seized in his demesne as of fee, of and in the said messuage and land, with the appurtenances; and the said J. P. and P. H. being so respectively seized, heretofore, and long before the said several times when, &c. to wit, on, &c. at, &c. (venue) aforesaid, by a certain deed then and there made between him the said J. P. of the one part, and the said P. H. of the other part, which said deed hath since been lost and destroyed by accident, and therefore cannot be brought into court here, and the date whereof for that reason is wholly unknown to the said defendant, the said J. P. so being the owner of the said closes, in which, &c. did grant to the said P. H. so then being owner of the said messuage and land, with the appurtenances, and to his heirs and assigns, a certain way for himself and themselves, and his and their farmers and tenants, occupiers of the said messuage and land with the appurtenances, for the time being, and for his and their workmen, into, through, over, and across the said closes in which, &c. a certain way towards a certain common and public king's highway in the parish aforesaid, in the county aforesaid, and so back again, into, through, over, and across the said closes in which, &c. in the said way there, towards the said messuage and lands, with the appurtenances, to go, return, pass, and repass, on foot and on horseback, and with their cattle, carts, and other carriages, every year, and at all times of the year, for the convenient and necessary use, occupation, and enjoyment of the said messuage and lands,

The like in  
another  
form (r).

[\*1124]

(p) See the notes, ante, 1118, 1119.

to be stated ?

(q) Quære if the derivative title ought not

(r) See the notes to the form, ante, 1112.

TO REAL  
PROPERTY.PRIVATE  
WAY.

[\*1125]

Right of  
way of ne-  
cessity (s).Defendant  
seised of  
adjoining  
close.E. F. for-  
merly  
seised  
thereof,  
and of lo-  
cus in quo.E. F. ali-  
ens locus  
in quo to  
G. H.

[\*1126]

with the appurtenances; by virtue of which said grant, he the said defendant, having the estate of the said P. H. of and in the said messuage and land, with the appurtenances, and being seized thereof in his demesne of fee, and so being in the occupation thereof, and having occasion to use the said way for the convenient and necessary use, occupation, and enjoyment thereof, at the said several times when, &c. entered into the said closes, in the said declaration mentioned, and with horses, mares, geldings and other cattle, and with carts, wagons, and other carriages, passed and repassed from the said messuage and land, with the appurtenances, into, through, and across the said closes, in which, &c. in the said way there-  
towards the said common and public king's "highway, and back again in the said way into, through and across the said closes, in which, &c. to-  
wards the said messuage and land, with the appurtenances, as it was law-  
ful for him to do, for the cause aforesaid, and in so doing, &c.—[*Same as in form, ante, 1118, from the † to the end, mutatis mutandis.*]

[*First plea, general issue, as ante, 1061; second plea, prescriptive right of way, as ante, 1118; third plea, right of way by grant, as in the above form; fourth plea, as follows:*]—And for a further plea in this behalf, [as to the said several supposed trespasses in the introductory part of the said second plea mentioned and therein justified,] the said defendant, by like leave, &c. says, [*actio non, &c. as ante, 907, fourth form*] because he says, that he the said defendant, before and at the said several times when, &c. was and still is seised in his demesne as of fee, and in a certain close called —, contiguous and next adjoining to the said close, in which, &c. and that one E. F. whose estate in the said close called — the said defendant now hath, before and at the time of the making of the alienation and conveyance hereinafter mentioned, was seised in his demesne as of fee, as well of and in the said close, in which, &c. as of the said other close, now of the said defendant with their respective appurtenances; and the said E. F. being so seised of the said closes respectively, long before any of the said several times when, &c. to wit, &c. A. D. — at the parish aforesaid duly granted, aliened, and conveyed (t) the said close, in which, &c. to a certain other person, to wit, G. H. and to the heirs and assigns of the said G. H.; by means whereof the said G. H. then and there became and was seised in his demesne as of fee, of and in the said close "in which, &c.; and the said defendant further saith, that at the time of the said alienation and conveyance of the said close, in which, &c. the said E. F. who was seised thereof, also aliened and conveyed the same as aforesaid, not having any other way to the said close, now of the said defendant, otherwise than from and out of a certain public highway in the county aforesaid, into, through

(s) See the forms, Lutw. 1487.—9 Went. 161, 2, &c.—8 T. R. 50.—5 Taunt. 311; and as to the law and use of this plea, 5 Taunt. 311.—4 M. & S. 387.—3 Taunt. 81.—1 Saund. 328 a, b. note 6.—8 T. 50.—Cro. Jac. 170.—1 B. & P. 374, n. a.—Willes, 71.—As to the form, see 10 East, 57. A way of necessity is not extinguished by unity of seisin. 1 Saund. 823 a; a way of necessity is limited by the necessity which created it, and ceases, if there be

any other way, 2 Bing. 76. See form of recitation to this plea, Id.

(t) *Quære* if the conveyance, deed, &c. well as the parties thereto, ought not to be stated, and if no such deed can be discovered then a deed between persons who were original owners should be feigned, and a grant of non-existing grant of a way added. See 10 East, 55.—4 M. & S. 387.—5 Taunt. 311.

over, and along the said close, in which, &c. by reason thereof the said E. F. who so aliened and conveyed the said close, in which, &c. as aforesaid, after such alienation and conveyance, necessarily whilst he continued seised of the said close now of the said defendant, ought to have had, and of right had, and the said defendant, so having the estate of the said E. F. as aforesaid, before and at the said several times when, &c. necessarily had, and of right ought to have had, and still of right ought to have a convenient way to the said close now of the said defendant, from the said highway, into, through, over, and along the said close, in which, &c. and that the said E. F. who so aliened and conveyed the said close in which, &c. and all the occupiers of the said close, now of the said defendant, after the said alienation and conveyance of the said close, in which, &c. and had and were accustomed to have, and of right ought to have had, and the said defendant still of right ought to have, a certain necessary way for themselves and their servants on foot, and with horses, mares, and geldings, carts and carriages, from the said highway, into, through, over, and along the said close, in which, &c. unto and into the said close now of the said defendant, to go and return, pass and repass, in every year, at all times of the year, for the necessary use and occupation of the said close, now of the said defendant, the same way being the nearest and most convenient way over the said close, in which, &c. to the said close, now of the said defendant. Wherefore at the said several times when, &c. the said defendant being so seised as aforesaid, and having occasion to use the said way, did, with his servants, and with his horses, mares, and geldings, carts, carriages, at the said several times when, &c. pass and repass in, by, through, and along the said way, from the said common king's highway, into, through, over, and along the said close of the said plaintiff, in which, &c. unto and into the said close now of the said defendant, and from thence back again, in, by, through and along the said way, unto and into the said common king's highway, using the said way there, for the purpose and on the occasion aforesaid, as he lawfully might for the cause aforesaid. And in so doing, &c.—[Same as in the form, ante, 1118, from the † to the end, justifying the trespasses according to the facts, observing the introductory part of the plea.]

TO REAL  
PROPERTYPRIVATE  
WAYS.And since  
the aliena-  
tion, E. F.  
&c. were  
entitled to  
the neces-  
sary way.Where-  
fore defend-  
ant enter-  
ed, &c.

[\*1127]

[See the forms, *Rast. Ent.* 618, a, b.—*Lutw.* 1427. The plea stating the possessory right will resemble that claiming a right of common by a tenant, as pointed out, ante, 1109. The lease for years, or demise from year to year, and then entry of the lessee, are to be stated, as ante, 574, 1102.—16 *East*, 346.—4 *M. & S.* 392.—2 *Rich. C. P.* 424; and where the defendant claims under a freeholder by prescription, are to be inserted in the form, ante, 1118, immediately after the statement of the right of common; and if under a copyholder, immediately after the statement of the grant of the customary tenement and the copyholder's entry, ante, 1120.]

Private  
way by a  
tenant un-  
der a lease,  
or from  
year to  
year, in  
either of  
the above  
cases.

[*Actio non*, as ante, 907, enumerating the trespasses, if necessary.]—A private right of way under at the time of the making and passing of the act of parliament, and making a local in-  
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PROPERTY.

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WAYS.

closure act  
and award  
(u).

the award hereinafter next mentioned, there was and of right ought to have been, a certain common and public highway from and out of a certain public highway called [P. H.] towards and into, through, over, and along the said closes in which, &c. towards and into a certain other highway, for all the liege subjects of our lord the king to go, return, pass and repass, on foot at all times of the year, at their free will and pleasure; and the said defendant further saith, that heretofore, to wit, on, &c. (*the day of passing the act*;) at the parish aforesaid, in the county aforesaid, a certain act of parliament was made and passed, intituled, "An Act, &c." (*state the title of the act*;) and that afterwards, and after the making and passing of the said Act of Parliament, to wit, on, &c. (*date of award*;) at the parish aforesaid, in the county aforesaid, P. H. esq. (*names of commissioners*;) then and there being the commissioners for carrying the said Act of Parliament into execution, and for affecting the purposes of the said Act, duly made and executed, and published their award in writing, under and in pursuance of the said Act of Parliament, and thereby (amongst other things) awarded that (*here state the award of the way, which in the case under which this plea was framed, was thus*;) a footway beginning at the gate entering the farm-yard of M. B. and extending eastwardly over the allotments awarded to the said M. B. and R. C. and others respectively, into the R. F. Road, should be set out, and was by the said award set out, for the use only of the proprietor of B. Farm-house, belonging to the said T. B. (meaning the now defendant.) And the said defendant further saith, that the said footway so set out by the said award as aforesaid, was, and is a footway into, through, over, and along the said closes in which, &c. in the same line and direction with the public and common footway hereinbefore mentioned. And the said defendant further saith, that he the said defendant, before and at the said several times when, &c. was and is lawfully seised in his demesne as of fee, of and in, and was and is the proprietor and occupier of the said B. Farm-house, wherefore the said defendant having occasion to use the said last-mentioned footway so awarded as aforesaid, did, at the said several times when, &c. pass and repass, in, by, through and along the said footway, into, through, over, and along the said closes, in which, &c. using the said way for the purpose aforesaid, and on the occasion aforesaid, as he lawfully might for the cause aforesaid; and in so doing he the said defendant, with his feet, in walking, unavoidably a little damaged and spoiled the earth and soil then being in the said closes, in which, &c.; and because the said gates, locks, staples, and hinges in the said declaration mentioned, before the said several times when, &c. had been and were wrongfully erected and were then standing and being across the said footway, and obstructing the same, so that without forcing, breaking open, breaking to pieces, damaging, and spoiling the same, the said defendant could not then pass and repass, into, through, over, and along the said closes in which, &c. in the said footpath there, as he ought to have done, the said defendant, at the said several times when, &c. in order to remove the said obstruction, forced, broke open, broke to pieces, damaged and spoiled the said gates, locks, staples, and hinges in the said declaration mentioned,

(u) See the case in 5 B. & C. 513.—8 D. & R. 299, S. C. wherein the above forms of pleas amongst others, were adopted.

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PROPERTYPRIVATE  
WAYS.

and took and carried the said gates, locks, staples, and hinges, to a small convenient distance, and there left the same for the use of the said plaintiff, doing no unnecessary damage to the said plaintiff on those occasions, which are the same supposed trespasses whereof the said plaintiff hath above complained against the said defendant. And this the said defendant is ready to verify, &c.—[*Conclude with a verification, as ante, Wt.*] [*Actio non.*].—Because he saith that before the said several times when, &c. and before and at the time of the making and passing of the Act of Parliament hereinafter mentioned, and at the time of making the award hereinafter mentioned, the said defendant was and from thence hitherto hath been, and still is, seized in his demesne as of fee, of and in a certain messuage called B. Farm-house, in the county aforesaid, near to the said closes in which, &c. and that he the said defendant, and all those whose estate he now hath, and at the said time of the making of the said Act of Parliament and award had, of and in the said messuage called B. Farm-house, from time whereof the memory of man is not to the contrary, have had and used, and have been accustomed to have and use, and of right ought to have had and used, a certain way for himself and themselves, and his and their servants, farmers, and tenants, occupiers of the said messuage, to pass and repass on foot, from a certain common king's highway called P. H. Road, in the parish of E. aforesaid, unto, into, through, over, and along the said closes of the said plaintiff, in which, &c. towards a certain other public highway at the said parish of E. and so from thence back again, unto, into, through, over, and along the said closes in which, &c. towards and unto and into the said common king's highway called P. H. Road, at all times of the year, at his and their free will and pleasure, as to the said messuage of the said defendant belonging and appertaining. And the said defendant further saith, that heretofore, to wit, on, &c. (*day of passing the act.*) at the parish aforesaid, in the county aforesaid, a certain Act of Parliament was made and passed, intitled, "An Act, &c." (*state the title.*) and that afterwards, and after the making and passing of the said Act of Parliament, to wit, on, &c. (*date of awards*) at and in, &c. P. H. esq. (*the commissioners who make the award.*) then and there being commissioners for carrying the said Act of Parliament into execution, and for effecting the purposes of the said Act of Parliament, duly made, executed, and published their award in writing, under and in pursuance of the said Act of Parliament, and thereby (amongst other things) awarded that one other footway, beginning at the gate entering the farm-yard of M. B., and extending eastwardly over the allotments awarded to the said M. B. and R. C. and other respectively, into the E. F. Road, should be set out, and the same was by the said award set out for the use only of the proprietor or occupier of B. farm-house, belonging to T. B. (meaning the now defendant.) And the said defendant further saith, that the said footway so set out by the said award as aforesaid, was and is a footway into, through, over, and along the said closes in which, &c. in the same line and direction as the said last-mentioned footway to which the said defendant was so entitled aforesaid, at the time of making the said last-mentioned award. And the said defendant further saith, that he the said defendant, before and at the said several times when, &c. was and is the proprietor and occupier of the said messuage called B. Farm-house, with the appurtenances where-

Second  
plea.

TO REAL PROPERTY  
 PRIVATE WAYS.  
 fore the said defendant having occasion to use the said last-mentioned footway, did, at the said several times when, &c.—[*Conclude as in the preceding form.*]

Plea, justifying entry into a close and well, under a prescriptive right to take water from the well for the use of a messuage whereof defendant was seised.

[*First plea, general issue; second plea, as follows:*—And the defendant, for a further plea, &c. as to the breaking and entering the said close in the said first count mentioned, and with the said iron instruments tearing up, breaking to pieces, damaging, and spoiling the said boards and planks, and as to casting and throwing a small part of the said wood, bricks, stones, and rubbish into the said well, in the said last count mentioned, the said defendant says, that the said plaintiff ought not to have or maintain his aforesaid action thereof against him the said defendant, because he says, that he the said defendant, long before and at the said several times when, &c. was and is seized in his demesne as of fee, of and in a certain messuage, with the appurtenances, in the parish aforesaid, near to the said close and well, in which, &c. and that he the said defendant, and all those whose estate he now hath, and at the said several times when, &c. had, of and in the said messuage, with the appurtenances, from time whereof the memory of man is not to the contrary, have had and used, and have been accustomed to have and take, and of right ought to have had and taken, and the said defendant still of right ought to have and take, water from the said well in the said first and last counts mentioned, and carry the same from thence to the said messuage, with the appurtenances, to be used and consumed therein, at all times of the year, at his and their free will and pleasure, as belonging and appertaining to the said messuage, with the appurtenances; wherefore he the said defendant, at the said several times when, &c. having occasion for water to be used and consumed in the said last-mentioned messuage, at the said several times when, &c. entered the said close in which, &c. in order to take and carry away such water, as last aforesaid, from the said well to the said messuage, to be used and consumed therein; and because at the said time when, &c. the said well was covered and wrongfully closed and shut with the said boards and planks, so that the defendant could not otherwise get water from the said well, he the said defendant, in order to open the said well and get water therefrom, at the said time when, &c. did necessarily, with the said iron instruments, tear up and a little break to pieces, damage, and spoil the said boards and planks, and in so doing did unavoidably throw a part of the materials thereof coming into the said well, and in so doing unavoidably cast and throw a small part of the said wood, bricks, stones, and rubbish into the said well, doing no unnecessary damage to the said defendant on those occasions, and as he lawfully might for the cause aforesaid, which are the said several supposed trespasses in the introductory part of this plea mentioned, and whereof the said plaintiff hath above thereof complained against him the said defendant. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

ENTRY FOR  
 TITHES.  
 Justifica-

[*First plea, general issue, as ante, 1061.*—And for a further plea in this



behalf, [as to (x) the breaking and entering the said close in the said declaration mentioned, and with feet in walking, treading down, trampling upon, consuming, and spoiling the grass and corn of the said plaintiff, then and there growing, and with the wheels of the said carts, wagons, and other carriages, and with the feet of the said cattle drawing the same, treading down, trampling upon, consuming and destroying other the grass and corn of the said plaintiff there standing and being in shocks and sheaves, and the said quantities of corn in the said close, taking and carrying away, and converting and disposing thereof to their own use, above supposed to have been done by the said C. D. and E. F.] they the said C. D. and E. F. \*by leave of the court here, for this purpose first [1129] had and obtained, according to the form of the Statute in that case made and provided, say, that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because they say, that the said C. D. long before, and at the said first time when, &c. was, and from thence hitherto hath been and still is, rector of the rectory of the parish church of — in the said county of — and that the said close in the said declaration mentioned, called, &c. in which, &c. at the said several times when, &c. in the said [first count] mentioned, was situate, and being in the parish of — aforesaid, and within the bounds, limits, and sitheable places of the same parish, and that all and singular the tithes of corn and grain yearly arising, growing, renewing and happening, in, upon, and from the said close, in which, &c. within forty years next before and at the time of the making of a certain Act of Parliament passed in the reign of Edward the Sixth, formerly king of England, and from the time whereof the memory of man is not to the contrary, of right ought to have been, and still of right ought to be, set out, yielded and paid in kind, to the rector of the said rectory for the time being (y). And the said C. D. and E. F. further say, that divers quantities of wheat, oats, and barley,] in the year of our Lord — aforesaid, grew and arose in the said close, in which, &c. and that before any of the said times when, &c. in the said first count mentioned, to wit, at, &c. in the year last aforesaid, the said last-mentioned [wheat, oats, and barley,] were cut down, and the tenth part thereof duly severed from the residue thereof, and set out, as and for the tithe of the said last-mentioned wheat, oats, and barley,] according to the immemorial usage and custom within the said parish, and were at the said times when, &c. in the said first count mentioned in the said close, for the use of him the said C. D. as such rector as aforesaid, whereupon the said C. D. as such rector as aforesaid, and the said E. F. as his servant, and by his command, afterwards, to wit, at the said first time when, &c. in the said first count mentioned, the same being respectively within a reasonable time after the cutting down of the said [wheat, oats, and barley,] entered the said close, in which, &c. with the said carts (z), wagons, and other carriages in the said declaration mentioned, drawn with the said cattle

TO REAL  
PROPERTY.ENTRY FOR  
TITHES.tion on en-  
try land to  
take tithe  
(w).

(w) See the forms, 9 Wentw. Index, lxxvi; 10 Co. 88 a, 91 a, and Com. Dig. Pleading, 3 M. 40. A rector may enter a close to carry away tithes, over the usual way by which the other nine parts are carried away, 2 New. Rep. 266. As to the replication, see Cro. Jac. 224, 241. 157, and Com. Dig. Pleading, F. 18, 19.

(z) This enumeration of the trespasses imputed to the justified, must depend on the

statements in the declaration, and in many cases may be wholly unnecessary.

(y) See the notes, ante, vol. ii. 496, 497.

(z) This averment must depend on the averments in the declaration; it would in general suffice to say, "committed the said several supposed trespasses in the introductory part of this plea, and in the said declaration mentioned."

TO REAL  
PROPERTY.ENTRY FOR  
TITHES.

[1180]

theroin also mentioned, in, by, through, and along the usual way and entrance into the said close, in which, &c. and to take, fetch, carry away the said tithes, the same being the said corn in the said first count mentioned, and therein alleged to have been taken and carried away by the said C. D. and E. F. and the same having been so severed and set out as aforesaid, and did then and there, "within a reasonable time, for that purpose, take and carry away the same out of the said close, in which, &c. in the said wagons, carts, and other carriages, and converted and disposed thereof to their own use, and in so doing he the said C. D. and the said E. F. as his servant as aforesaid, did, at those respective times; with their feet in walking, necessarily and unavoidably tread down, trample upon, consume, and spoil a little of the grass and corn of the said plaintiff growing and being in the said close, and with the wheels of the said carts, wagons, and other carriages, and with the feet of the said cattle drawing the same, did necessarily and unavoidably tread down, trample upon, consume, and spoil a little of the grass and corn of the said plaintiff there growing, and the said cattle, drawing the said carriages, while the said tithes were so being taken, fetched, and carried away as aforesaid, by stealth and morsels, and against the will of the said C. D. and E. F. eat up, consumed, and destroyed a little of the corn of the said plaintiff in the said close, in shocks and sheaves, the said C. D. and E. F. doing no unnecessary damage to the said plaintiff on the occasion aforesaid; which are the same supposed trespasses in the introductory part of this plea mentioned, and whereof the said plaintiff has above complained against the said C. D. and E. F. And this, &c.—  
[Conclude with a verification, as ante, 907, sixth form. Add a plea of license, as ante, 1106, if there be any evidence to support it.]

TO REMOVE  
PRIVATE  
NUISANCES.  
Plea justifying pulling down a wall because it obstructed and darkened an ancient light (a).

[*Actio non*, as ante, 906.]—Because he says, that one A. B. at the said several times when, &c. and long before, was, and yet is, lawfully possessed of an ancient messuage with the appurtenances, in the said parish and county contiguous and adjoining to the said close, in which, &c. And because the said plaintiff at the said several times when, &c. injuriously and wrongfully erected and placed the said wall in the said close in which, &c. to obstruct and darken, and did thereby then and there obstruct and darken an ancient window of the said A. B. by which light was conveyed into the said messuage of the said A. B. to the great damage and annoyance of the said A. B. he the said defendant, at the said several times when, &c. as the servant of the said A. B. and by his command entered into the said close, in which, &c. to remove the said nuisance and did walk in and over the said close, and did a little tread down, trample upon, and damage the grass and soil there, and prostrate and destroy such part of the said wall so erected and placed there as was necessary to be prostrated and destroyed, for the purpose of abating the said nuisance, as it was lawful for him to do for the cause aforesaid, and thereupon then and there abated and removed the said nuisance, and in so doing, the said defendant did, necessarily and unavoidably, take down and carry away the materials of the said

(a) As to the right to abate a private nuisance see the note, ante, 1102; and see the notes, ante, vol. ii. 768, to a declaration there, justifying the cutting plaintiff's trees overshadowing defendant's land.

part of the said wall, and did remove the same to another part of the said close, and leave the same there for the use of plaintiff, and in so doing as aforesaid did, necessarily and unavoidably, a little tread down, trample upon, and damage the said grass and soil there, doing as little damage, &c. to the said plaintiff, on the occasion aforesaid, as he possibly could, which are the said several supposed trespasses, in the introductory part of this plea mentioned, and whereof the said plaintiff hath above complained against the said defendant. And this, &c.—[*Conclude with a verification, as ante, 907, seventh form; add another plea, stating that plaintiff continued the nuisance after a request to remove it.*]

TO REAL  
PROPERTY

[*First plea, not guilty, as ante, 1061; second plea, as follows:*]—As to the breaking and entering the said close in which, &c. and treading down, and trampling upon the said grass, and taking and seizing, and leading away the said gelding, the said defendants say, [*actio non, as ante, 906.*] Because they say, that the said C. D. long before the said time when, &c. to wit, on, &c. was possessed of the said gelding, as of his own proper gelding, to wit, at, &c. and the said C. D. being so possessed thereof, the said plaintiff did then and there, with force and arms, take the said gelding from the said C. D. and put him into the said close, and wrongfully detained him therein until the said time when, &c. wherefore the said C. D. in his own right, and the said E. F. as the servant of the said C. D. and by his own command, at the said time when, &c. broke and entered the said close in which, &c. in order to retake the said gelding, and did retake the said gelding and carry him away, as he lawfully might for the cause aforesaid.—And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

ENTRY TO  
RETAKE  
PROPERTY  
DETAINED  
BY PLAIN  
TIF.

Plea, justifying entering plaintiff's close, and taking away gelding, that plaintiff had forcibly taken it away from defendant(b).

[*First plea, general issue, as ante, 1061; second plea, as follows:*]—And for further plea in this behalf, [as to (d) the breaking and entering the said dwelling-house of the said plaintiff, in the said first count of the said declaration mentioned, and making a noise and disturbance therein, and staying and continuing therein, making such noise and disturbance, without the leave or license, and against the will of the said plaintiff for the said space of time in the said first count mentioned, and then and there forcing and breaking open, breaking to pieces, damaging, and spoiling the said doors, windows, locks, bolts, bars, staples, and hinges of the said plaintiff in the said first count mentioned,] the said defendant, by leave of the court here for this purpose first had and obtained, according to the form of the Statute in such case made and provided, saith, that the said plaintiff ought not to have or maintain his aforesaid action, thereof against him; because he saith, that before the said time when, &c. in the said [first count] mentioned, to wit, on, &c. [*the teste of the writ; here set forth the writ of latitat, the indorsement for bail, delivery of the writ to the sheriff, and warrant to the defendant, and delivery thereof to the*

UNDER  
MISFE  
PROCESS.

Justification of entry into house, and breaking inner doors, &c. under a latitat, and sheriff's warrant thereon against plaintiff (c).

[\*1181]

(b) As to the right of entry for this purpose, 3 Bla. Com. 4.—Com. Dig. Pleader, 3 M. 8 T. R. 78—2 Roll. Rep. 55, 208.—2 Roll. 565.

(c) See the form, Thomp. Ent. 299; and as to this plea in general, 3 B. & P. 329.—4

Taunt. 619. As to the breaking open of outer doors, See Tidd's Prac. 9th edit. 1012.

(d) This enumeration of the trespasses intended to be justified, must depend on the statements in the declaration, and in many cases may be wholly unnecessary.

TO REAL  
PROPERTY.

UNDER  
MESNE  
PROCESS.

*defendant, as in the form, ante, to 1085.]* By virtue of which said warrant the said defendant, as such bailiff as aforesaid, afterwards, and before the time appointed for the return of the said writ, to wit, at the said time when, &c. in the said [first count] mentioned, and within the bailiwick of the said G. H. as such sheriff as aforesaid, peaceably and quietly entered into the said dwelling-house, in which, &c. the outer door thereof then and there being open, (e), and there then and there being reasonable and sufficient ground and cause for the said defendant to suspect and believe, and the said defendant then and there suspecting and believing that the said plaintiff then was in the said dwelling-house in order to take and arrest the said plaintiff under and by virtue of the said writ and warrant, as it was lawful for him to do for the cause aforesaid, and in order to arrest the said plaintiff under and by virtue of the said writ and warrant, he the said defendant did then and there necessarily and unavoidably make a little noise and disturbance in the said messuage or dwelling-house, and stay and continue therein making such noise and disturbance for the said space of time in the said [first count] mentioned. And the said defendant further saith that at the said time when, &c. in the said [first count] mentioned, the said plaintiff not having been taken or arrested under or by virtue of the said writ or warrant, and the entrance of divers, to wit, — rooms and — apartments in the said dwelling-house, in the said first count mentioned, and of and belonging to the same, being fastened and stopped by and with the said doors (f), windows, locks, bolts, bars, staples, and hinges, in the introductory part of this plea mentioned, and there then and there being reasonable and sufficient ground and cause for the said defendant to suspect and believe, and the said defendant then and there suspecting and believing that the said plaintiff then was in the said rooms and apartments, or one of them, he the said defendant did then and there demand and request one I. K. being the only person then and there present in the said dwelling-house, to deliver the keys of the said respective doors to the said defendant and "to permit and suffer the said defendant to enter into the said rooms and apartments, in order to search for the said plaintiff therein, but the said I. K. then and there wholly neglected and refused so to do, and then and there obstructed and hindered the said defendant from entering into the said rooms and apartments, or either of them, for the purpose aforesaid (g), so that without forcing and breaking open the said doors, windows, locks, bars, staples, and hinges, the said defendant could not at the time when, &c. enter into the said rooms and apartments to search for or arrest the said plaintiff in the same; therefore he the said defendant at the said time when, &c. in the said first count mentioned, in order to search for, find and arrest the said plaintiff, under and by virtue of the said writ and warrant, necessarily broke open the said doors, windows, locks, bolts, bars, staples, and hinges, in the said first count mentioned, and in so doing necessarily and unavoidably a little broke to pieces, damaged and spoiled the same, doing no unnecessary damage to the said plaintiff on the occasion aforesaid; which are the said several supposed trespasses in the said introductory part of this plea men-

[\*1132]

(e) This is absolutely requisite, 11 Moore, 40. he found necessary.

(f) These averments must agree with those in the declaration, and in most cases will

(g) These allegations must be according to the facts, 3 B. & P. 226.

tioned, and whereof the said plaintiff hath above thereof complained against him the said defendant. And this, &c.—[*Conclude with a verification, as ante, 907, sixth form.*]

TO REAL  
PROPERTY.

[*First plea, general issue, as ante, 1061; second plea, as follows:*—And for a further plea in this behalf, [as to (k) the breaking and entering the said dwelling-house, in the said first count of the said declaration mentioned, and in which, &c. and making a noise and disturbance therein, and staying and continuing their said noise and disturbance in the said messuage or dwelling-house of the said plaintiff, for the said space of time in that count mentioned (k), and their seizing and taking the said goods and chattels in the said first count of the said declaration mentioned, and converting and disposing of the same to their own use; and also as to the seizing and taking of the said goods and chattels in the said last count of the said declaration mentioned, and converting and disposing thereof to their own use, above supposed to have been done by the said C. D. and E. F.;] they the said C. D. and E. F. by leave, &c. say [*actio non, as ante, 907, fourth form*], because they say, that the said C. D. before the said time when, &c. in the said declaration mentioned, to wit, in — Term, &c. [*here state the judgment in debt or assumpsit, and the reference thereto, as in the forms, ante, 483 to 493, observing the notes, and then proceed as follows:*—And the said C. D. and E. F. further say, that afterwards, and before the said time when, &c. to wit, on, &c. [*state the fieri facias, indorsement to levy, and delivery thereof to one G. H. as sheriff, as ante, 748, 749, and then proceed as follows:*] by virtue of which said writ, the said G. H. esq. so being sheriff of — as aforesaid, afterwards, and before the return of the said writ, and before the said time when, &c. to wit, on the — day of — in the — year aforesaid, at, &c. (*venue*) aforesaid, made his certain warrant in writing, sealed with the seal of his said office of sheriff of the said county of — as aforesaid, directed the said E. F. (he the said E. F. then and at the said time when, &c. being bailiff of the said sheriff,) and by the said warrant the said sheriff then and there commanded him the said E. F. that of the goods and chattels of the said plaintiff in the said sheriff's bailiwick, he should cause to be made as well the said debt of £ — which the said C. D. had lately recovered in the said court of our said lord the king, before the king himself, at Westminster aforesaid, as also the said sum of £ — for his damages, costs, and charges aforesaid, so that the said sheriff might have the said sums of money before our said lord the king at Westminster aforesaid, \**(or, if in C. P. "of the Bench aforesaid,")* on, &c. (*the return-day of the writ,*) to render to the said C.

UNDER  
FINAL  
PROCESS.

Justifica-  
tion of en-  
try into  
plaintiff's  
house, and  
seizing his  
goods under  
a *feri facias*  
against  
him. (i).

[\*1133]

The judg-  
ment  
against  
plaintiff (l).  
*Fieri fa-*  
*ciase* against  
plaintiff.  
Sheriff's  
warrant to  
one of the  
defendants  
(m).

[\*1134]

(A) The enumeration of the trespasses intended to be justified, must depend on the elements in the declaration, and in many cases may be wholly unnecessary.

(f) See the forms, 9 Wentw. Ind. xcviii. and as to the mode of justifying under the legal process in general, see Com. Dig. Pleader 3 M. 24.—Ante, vol. i. Index, "*Process*." as to the right and law of breaking open doors see Tidd, 9th ed. 1011, 1012.—5. Taunt. 20.—1 Marsh. 333, S. C.

(k) If there was any illegal abuse, as staying too long, &c. the plaintiff must new assize. 2 Campb. 175, 6.—10 East, 78.

(l) When the plaintiff in the original action justifies under a *fi. fa.* he must state the judgment, but the *sheriff* or *his officer* need not, and if there be any doubt as to the regularity of the judgment the latter should plead separately, Com. Dig. Pleader, 3 M. 24.—3 Lev. 20.—Stra. 509, 993, 1184.—1 Wils. 17.

(m) As to the mode of pleading a warrant, see ante, 1084, note. Examine with the warrant. Where only the sheriff or the plaintiff in the original action justifies, the warrant need not be stated, but where the bailiff justifies it should be stated.

TO REAL  
PROPERTY.UNDER  
FINAL  
PROCESS.Delivery of  
warrant to  
such defend-  
ant.Entry and  
seizure by  
the two de-  
fendants.

D. for his debt and damages, costs and charges aforesaid; which said warrant afterwards, and before the return of the said writ, and before the said time when, &c. to wit, on the same day and year aforesaid, at, &c. (*venue*) aforesaid, was delivered to the said E. F. so being such bailiff as aforesaid, to be executed in due form of law\*; by virtue of which said writ and warrant, the said E. F. so being such bailiff as aforesaid, and the said C. D. as the servant of the said E. F. and by his command, afterwards, and before the return of the said writ, to wit, at the said time when, &c. peaceably and quietly entered into the said messuage or dwelling-house, in which, &c. (the outer door thereof being then and there open (n),) in order to seize and take, and did then and there seize and take in execution, the said goods and chattels of the said plaintiff, in the introductory part of this plea mentioned, the same then and there being in the said messuage or dwelling-house, for the purpose of levying the monies so directed to be levied by the said indorsement on the said writ and by the said warrant as aforesaid, and did then and there by sale thereof, levy a certain sum of money, to wit, the sum of £— part and parcel of the debt and damages, costs and charges aforesaid (o); and he so doing the said E. F. so being such bailiff as aforesaid, and the said C. D. as his servant as aforesaid, did then and there necessarily and unavoidably make a little noise and disturbance in the said messuage or dwelling-house, and stay and continue therein, making such noise and disturbance, for the said space of time in the said first count of the said declaration mentioned †, as they lawfully might for the cause aforesaid, doing no unnecessary damage to the said plaintiff on that occasion; which are the said several supposed trespasses in the introductory part of this plea mentioned, and whereof the said plaintiff hath above thereof complained against the said C. D. and E. F. And this, &c.—[*Conclusion with a verification, as ante, 907, sixth form.*]

Justifica-  
tion of en-  
try into  
plaintiff's  
house un-  
der a *fi. fa.*  
against  
another per-  
son (p).

[\*1135]

[*This plea is similar to the former, as far as the asterisk, omitting the enumeration of the trespasses, and what relates to the seizure of goods, and stating that the judgment was recovered, and execution issued against "one J. K." and, at the asterisk, insert the following averment.*].—And the said C. D. and E. F. further say, that before and at the said time when, &c. divers goods and chattels of the \*said J. K. liable to be taken in execution by the said E. F. as such bailiff as aforesaid, under and by virtue of the said writ and warrant, were in the said messuage or dwelling-house in the said declaration mentioned, and that thereupon, under and by virtue of the said writ and warrant, the said E. F. &c.—[*State the entry into the dwelling-house of plaintiff, and the seizure of the goods of J. K. therein, as ante, 1134, from the asterisk to the end, omitting what relates to the sale of goods.*]

(n) This is absolutely requisite, 11 Moo. 40.

(o) Where the plea is by the sheriff, the sale of the goods, and the return of the writ, may be, as in the form, post, 1135.

(p) See the notes to the last form. It frequently happens that under an execution against a debtor, a fraudulent conveyance of his goods to a third person, in whose house they were taken, is set up, and he brings an

action of trespass; in this case the justification must be confined as above, to the entry into the house, and the plaintiff's property in the goods disputed, under the general issue. A party cannot justify entering the house of a stranger under a *fi. fa.* against a third person, unless such third person's goods were actually in the house, 5 Taunt. 769. 1 Marsh. 234. C.—Tidd, 9th ed. 1011; and see Palm. 62. 6 Taunt. 246.—1 Marsh. 565, S. C.

[Same as in the form, ante, 1134, to the †, except that the judgment is not to be stated, and then proceed as follows:—] And afterwards, and before the return thereof, to wit, on the same day and year last aforesaid, in the county aforesaid, sold the same goods and chattels, and by such sale thereof and of certain other goods and chattels of the said plaintiff made and levied the sum of £— towards satisfaction of the debt and damages aforesaid, as it was lawful for him to do for the cause aforesaid. And the said defendant afterwards, and before the return of the writ, to wit, on the day and year last aforesaid, in the county aforesaid, paid to the said E. F. the sum of £— part of the said sum of money so made by sale of the said goods and chattels as aforesaid, in part satisfaction of the debt and damages aforesaid; and afterwards, and at the return of the said writ, to wit, on, &c. returned the said writ to the said court of our said lord the king, before the king himself, at Westminster aforesaid, and then there returned thereon, that by virtue thereof, he had caused to be levied of the goods and chattels of the said plaintiff, the said sum of £— part whereof, to wit, the sum of £— he had retained for poundage due on the said levy, and that £— residue thereof, he had paid to the said E. F. in part satisfaction of the debt and damages therein mentioned, and that the said plaintiff had not any other or more goods and chattels in the bailiwick of him the said defendant, whereof the said defendant could cause to be levied the residue of the said debt and damages, or any part thereof. Which are, &c.—[Same as the form, ante, 1134, to the end.]

TO REAL  
PROPERTY.  
UNDER  
FINAL  
PROCESS  
Justifica-  
tion by a  
sheriff under a *fi. fa.*  
(q).

[\*1186]

[First plea, general issue, as ante, 1061; second plea, as follows:—] And for a further plea in this behalf, [as to (s) the breaking and entering the said piece or parcel of land, part of the said close in which, &c. situate, lying, and being in the said parish of — in the county of — and with feet, in walking, treading down, trampling upon, consuming, and spoiling the grass, ling, furze, fern and herbage of the said F. there growing, and digging up, tearing up, damaging, and spoiling the soil of the same piece or parcel of land, and digging up, taking and carrying away, in and from the said piece or parcel of land, the said stones, gravel, and sand, in the said first count mentioned, and as to the seizing, taking and carrying away the said gravel, stones, and sand, of the said J. in the said last count mentioned,] the said defendants, by leave, &c. [*actio non*, &c.] because they say, that the said W. S. before and at the several times when, &c. was and still is a surveyor of the highways, in and for the said parish of — and duly appointed to that office, in pur-

UNDER  
STATUTES  
Plea by a  
surveyor,  
justifying  
digging,  
&c. as sur-  
veyor, under  
General High-  
way Act,  
18 Geo. 3.  
c. 78 (r).

(q) See the notes to the form, ante, 1132. Though the above form is given, it does not appear to be necessary in this case to state a return, 10 East, 73. It is said, indeed, in 1 Salk. 409.—Com. Dig. Pleader, 3 M. 24.—6 E. 282, that in justifying under a *fi. fa.* the sheriff or other principal officer must show that the process has been returned; but this seems erroneous, for the distinction is between *return* and *final* process, and no return of the writ need in general be stated in the pleading, Rep. 67 a.—5 Id. 90 a.—2 Salk. 700.—1 Ld. Rayn. 776.—Com. Dig. Return, E. 1. Executions, C. 7.—10 East, 73.—5 B. & C. 489.

(r) See the sections of the general Highway Act, authorizing the surveyor, &c. to take materials, and decisions thereon, 8 Burn, J. 26th ed. 32 to 35, as to the appointment of the surveyor, see id. 49. The 81st section of the act allows the defendant to give the matter in evidence under the general issue, and limits the time for bringing action, and gives treble costs. Section 78 provides that the defendants shall not be deemed trespassers *ab initio*.

(s) The enumeration of the trespasses intended to be justified, must depend on the statements in the declaration, and in many cases may be wholly unnecessary.

TO REAL  
PROPERTYUNDER  
STATUTES.

[\*1187]

suance of the Statute in that case made and provided; and that before and at the said several times when, &c. the highways within the said parish of — being out of repair, and there being occasion for stones, sand, and gravel, to repair the same, and the said piece or parcel of land in the introductory part of this plea mentioned, and in which, &c. before and at the said several times when, &c. being certain waste land and common ground in the said parish of — he the said W. S. as such surveyor as aforesaid, \*and the said W. F., W. P., and I. S. as his servants, and by his command, at the said several times when, &c. entered the said piece or parcel of land in the introductory part of this plea mentioned, in which, &c. being such waste land and common land as aforesaid, for the purpose of searching for, digging for, getting, and carrying away, and did then and there dig up and carry away the said stones, gravel, and sand, in the said declaration mentioned, from and out of the said piece of parcel of land in the introductory part of this plea mentioned, so being waste land and common ground as aforesaid, for the mending of the said highway so out of repair as aforesaid, and for the use thereof, the same being fit and necessary for that purpose, and then and there used and applied the said stones, gravel, and sand so dug up, taken, and carried away as aforesaid, in and about the necessary repairing and amending of the said highways, as it was lawful for them so to do. And this, &c. [Conclude with a verification, as ante, 907.]

Plea to trespass in plaintiff's house, and taking his goods, that the goods had been fraudulently removed there by plaintiff, to prevent a distress for rent due to one of defendants for other premises, wherefore defendants entered and distrained, under 11 Geo. 2, c. 19 (v).

[\*1188]

[First plea, general issue; second plea, *actio non*.]—Because they say that the said plaintiff, on, &c. (*day when rent fell due*,) and for a long space of time then last past, and from thence until and at the said time when, &c. held and enjoyed certain premises, situate and being in the parish of — in the county aforesaid, as tenant thereof to the said C. B. under and by virtue of a certain demise thereof, before then made by the said C. D. to the said plaintiff (t), upon which demise a certain yearly rent to wit, the rent or \*sum of £— was reserved and made payable by the said plaintiff to the said C. D. by four even and equal quarterly payments to wit, on, &c. (*stating the days of payment*;) and the said C. D. in fact further says, that just before the said time when, &c. to wit, on the (w) day and year last aforesaid, a large sum of money, to wit, the sum of £— the rent aforesaid for [one quarter] of a year of the said demise ending on the day and year last aforesaid, became and was due, owing, and payable from the said plaintiff to the said C. D. and from thence until and at the said time when, &c. remained and continued due, in arrear, and unpaid, and the said C. D. and E. F. in fact further say, that just before

(t) This statement of the parties to the original demise seems unnecessary, and should be omitted, if not clearly the fact.

(u) See the avowries, ante, 1058, and notes. The defense cannot, under 11 Geo. 2, c. 19, be given in evidence under the general issue, but must be pleaded specially, *vide* 1 Esp. Rep. 257.—4 Campb. 136.—If a third person sues for the entry into his house, and taking the goods as his goods, the justification must be confined to the entry into the house, and the plaintiff's property in the goods must be disputed under the general issue; for the statute 11 Geo. 2, c. 19, s. 1 & 2, only applies to the tenant's goods being fraudulently removed, and even protects subsequent *bona fide* sales.

In the latter case it will not be necessary to state how the goods are to be disposed of. As to what cases are within the act, and what will be a good defence under this plea, see ante 495 b, c.

(w) It has been considered that the statute 11 Geo. 2, c. 19, applies only to removals when the rent is actually due and in arrear, *vide* 1 Esp. N. P. Rep. 16. 1 Saund. 284 a.—*vide* 4 Campb. 136; and the words of the statute do not justify such a conclusion. Rent is not actually due until the last instant of the day on which it is made payable; see also 1 Saund. 2, a, b. If the removal was before the rent became due, then omit the words between the inverted commas.



the said time when, &c. that is to say, "after the said rent became and was due and payable, and when the same was actually due, in arrear, and unpaid (w), and" within thirty days next before the said time when, &c. the said plaintiff fraudulently and clandestinely conveyed away, and carried off and from the said premises so held and enjoyed by the said plaintiff, as such tenant thereof to the said defendant as aforesaid, the said goods and chattels in the said declaration mentioned, *being the proper goods and chattels of him the said plaintiff (x)*, to prevent the said defendant from distraining the same for the said rent, so "before and at the time of the said removal actually" due, in arrear, and unpaid as aforesaid, and for that purpose conveyed the said goods and chattels in the said declaration mentioned, to the said [warehouse] in which, &c. *without leaving any other goods and chattels in the said premises, so held by the said plaintiff as aforesaid, whereon the said defendant could or might distrain for such arrear of rent, as aforesaid, (y)* for which reason, and because the said rent still remained in arrear and unpaid, and because there was no sufficient distress upon the said premises so held by the said plaintiff as aforesaid, whereon the said C. D. could distrain for such arrear of rent (z) and because the said goods and chattels, which had been so fraudulently and clandestinely conveyed away and carried off by the said plaintiff as aforesaid, still remained and were in the said [warehouse] in which, &c. to which the same had been so conveyed as aforesaid, the said C. D. in his own right, and the said E. as the servant of the said C. D. and by his command, afterwards, and while the said rent so remained due, in arrear, and unpaid as aforesaid, and within thirty days (a) next after the said goods and chattels were, and had been so fraudulently and clandestinely conveyed away and carried off as aforesaid, that is to say, at the said time when, &c. entered into the said [warehouse] in which, &c. in the said declaration mentioned (b) (the outer door thereof being then open (c)), in order to seize and take the said goods and chattels, so therein being as aforesaid, as a distress for the said arrear of rent so due and owing unto the said C. D. as aforesaid, and did thereupon, at the said time when, &c. and within thirty days next after the said goods and chattels had been and were so fraudulently and clandestinely conveyed away and carried off as aforesaid, in the said [warehouse] in which, &c. take and seize the said goods

[\*1139]

(w) See preceding note.

(x) It must appear that the goods removed were the property of the tenant, for it seems by analogy with the decision on the statute 8 Geo. 2, c. 14, reported in *Strange*, 787, that the statute 11 Geo. 2, c. 19, s. 2, does not extend to ledgers, or persons not being immediate tenants. See 5 M. & S. 38.

(y) These words, though commonly used, appear to be unnecessary.

(z) This averment, though usual, appears to be unnecessary.

(a) The statute requires the distress to be made within thirty days after the removal.

(b) Landlords and lessors are empowered by 11 Geo. 2, c. 19, sec. 7, to break open in

the day time, with the assistance of a peace officer, any place, where goods, fraudulently removed, are deposited, even a dwelling-house, "oath being first made before some justice of the peace of a reasonable ground to suspect such goods to be therein." See also 2 Saund. 284 b.

(c) This averment is necessary, see 11 Moore, 40.

(d) The stat. 11 Geo. 2, c. 19, s. 1, directs, that the goods shall be disposed of "in such a manner as if they had been distrained on the premises," and therefore the plea proceeds to show that the directions of the stat. 2 W. & M. s. 1. c. 8, have been complied with.

TO REAL  
PROPERTY.  
—  
UNDER  
STATUTES.

and chattels, in the introductory part of this plea mentioned, so there found, as a distress for the said arrear of rent (the same then remaining due, in arrear, and unpaid (*d*),) and did impound the same at "a small and convenient distance from the said [warehouse,] in which, &c. and did thereupon give due notice of such distress, and of the cause of such taking, and also of the said place where the said part of the said furniture, goods, and chattels was impounded, unto the said plaintiff, and did keep and detain the said goods and chattels, under the said distress, for the space of five days next after taking and carrying away the same as aforesaid, in order to give the said plaintiff an opportunity to replevy the same, according to the form of the Statute in such case made and provided; and the said plaintiff not having replevied the said part of the said goods and chattels, within the said space of such five days, the said C. D. in his own right, and the said E. F. as his servant, and by his command, afterwards, and after the expiration of the said space of five days, to wit, on the — day of — in the year aforesaid, caused the same to be in due manner appraised by two sworn appraisers (*e*), according to the form of the Statute in such case made and provided; and after such appraisement, the said C. D. and E. F. kept and detained same for the use of the said C. D. in satisfaction of the said rent and the charges of the distress and appraisement aforesaid (*f*), as they lawfully might for the cause aforesaid, inasmuch as the said plaintiff had not replevied the said part of the said furniture, goods, and chattels, or paid the said arrear of rent, together with the charges of the distress and appraisement aforesaid, to the said C. D. and E. F. And this the said defendants are ready to verify, wherefore, &c.—[*Conclude with a verification, as ante, 907.*]

[\*1141]

\*PLEA IN EJECTMENT.

General  
issue (*g*).

*In the King's Bench* (or "*C. P.*")

C. D.  
ats.

John Doe, on demise of A. B.  
and others.

he is not guilty of the said supposed trespass and ejectment [*e*]  
*if several ousters are laid in the declaration* "of the said supposed  
trespasses and ejectments" above laid to his charge, or of any part  
thereof, in manner and form as the said John Doe hath above there  
complained against him; and of this he the said C. D. puts himself upon  
the country, &c.

—Term, — Will. 4.

And the said C. D. by E. F. his  
attorney, comes and defends the force  
and injury, when, &c.—and says, that

(*e*) *Quere*, if it should not be shown by  
whom sworn, as directed by the stat. 2 W. &  
M. s. 1, c. 5.

(*f*) *Quere*, if a sale and payment of the  
overplus ought not to be stated, as directed

by the stat. 2 W. & M. s. 1, c. 5.

(*g*) See form, Tidd's Forms, 208. As  
pleading to the jurisdiction, see Tidd's Forms  
9th ed. 630.

## \*REPLICATIONS IN ABATEMENT.

*In the King's Bench (or, "C. P.")*

A. B. } ——— Term, ——— Will. 4.  
 agt. } And the said plaintiff saith, that his said bill [*or* "the said  
 C. D. } writ,"] by reason of any thing by the said defendant in her said  
 plea above alleged, ought not to be quashed, \* because he says, that at the  
 time of the exhibiting the said bill [*or, if in C. P. or by original, say,*  
 "at the time of issuing of the said writ,"] against the said defendant, she  
 the said defendant was not married to the said E. F. in the said plea  
 mentioned; in the manner and form as the said defendant hath above in  
 her said plea in that behalf alleged. And this he the said plaintiff prays  
 may be inquired of by the country, &c.

TO COV-  
ERTURE.To a plea  
of cover-  
ture, de-  
nying the  
fact (a).

[*Commencement as above, to the asterisk.*]—Because he saith, that the  
 said several promises and undertakings were not made by the said defend-  
 ant jointly and together with the said E. F. in manner and form as the said  
 defendant hath above in his said plea in that behalf alleged. And this he  
 the said defendant prays may be inquired of by the country, &c.

TO NON-  
JOINER.To a plea  
of non-  
joinder in  
assumpsit,  
that the  
promises  
were made  
by the def-  
endant  
alone (b).

A. B. }  
 agt. } And the said plaintiff saith, that his said bill [*or, if in C. P. or*  
 C. D. } *by original, say,* "the said writ,"] by reason of any thing by the  
 said E. D. in his said plea above alleged, ought not to be quashed, be-  
 cause he saith, that the said E. D. long before and at the time of the ex-  
 hibiting the bill, [*or, if in C. P. or by original, say,* "issuing of the said  
 writ,"] was, and still is, called and known as well by the name of C. D.  
 as by the name of E. D. to wit, at, &c. (*venue*) aforesaid. And this the  
 said plaintiff prays may be inquired of by the country, &c. (d).

TO MIS-  
NOMER.To a plea  
of misno-  
mer, that  
defendant  
was known  
as well by  
the one  
name as  
the other  
(c).

A. B. }  
 agt. } And the said plaintiff saith, that the said person against whom  
 C. D. } the said plaintiff hath exhibited his said bill by the name of C. D.  
 ought not to be admitted or received to plead the plea by him above plead-  
 ed, for quashing the said bill of the said plaintiff; because he saith, that the  
 said person against whom he the said plaintiff hath exhibited his said bill by

[\*1143]

To a plea  
of misno-  
mer, es-  
toppel by  
putting in  
bail (e).

(a) See the plea, and notes, ante, 899. The  
 forms in Lil. Ent. 128.—2 Rich. C. P. 1, 2—1  
 Will. 9, conclude with a formal traverse and  
 replication, but this, according to the general  
 use of replying, in 1 Saund. 103, b, n. 8, is  
 unnecessary, and the above form of commence-  
 ment and conclusion (inserting the word  
 "writ" instead of "bill," when the pro-  
 ceedings are in the Common Pleas, or by ori-  
 ginal) will in all cases suffice. If the defend-  
 ant had been married, but her husband dead,  
 the latter fact should be replied.

(b) See the pleas and notes, ante, 900, and  
 the forms, 1 Wentw. 17, 33, 47.—2 Rich. C.  
 P. 4, and the note to the last form.

(c) See Tidd's Forms, 6th edit. 286.—  
 Rastall's Entries, 54.—Thomp. 1.—1 Went.  
 Index. Evidence of the defendant having  
 been once or twice called by the name he is  
 sued by, will not suffice, 8 M. & S. 453. The  
 plaintiff may, even in a penal action, amend  
 writ and declaration, by applying to a judge,  
 8 M. & S. 450.

(d) 1 B. & P. 60—Rast. Ent. 108, 334.  
 Willes, 558.

(e) As to this replication, see Bac. Ab.  
 Pleas, 1. 11.—Thomp. Ent. 1.—Tidd's Forms,  
 6th ed. 267.—1 Ld. Raym. 249.—2 New Rep.  
 458.

TO MIS-  
NOMER.

the name of C. D. heretofore, to wit, in the Term of — last past, came into this court here, and put in bail at the suit of the said plaintiff in the plea aforesaid, by the name of C. D. as by the record thereof remaining in the said court of our said lord the king, before the king himself, at Westminster aforesaid, more fully appears. And this he the said plaintiff is ready to verify by that record; wherefore he prays judgment if the said person against whom he the said plaintiff hath exhibited his said bill by the name of C. D. ought to be admitted or received to his said plea for quashing the said bill, contrary to his own acknowledgment and the said record, &c. and that he may answer over to the said bill.

CASSETER  
BILLA VEL  
BREVE.  
Casseter  
billa vel  
breve (f).

And hereupon the said plaintiff, inasmuch as he cannot deny the several matters above pleaded by the said defendant, but admits the same to be true, prays judgment that the said bill [*or, if in C. P. or by original, say "writ,"*] of the said plaintiff may be quashed, to the intent that he the said plaintiff may exhibit a better bill [*or, if in C. P. or by original, say, "issue a better writ,"*] against the said defendant; therefore it is considered by the court of our said lord the king, before the king himself [*or, if in C. P. "of the Bench aforesaid,"*] now here, that the said bill [*or, "writ,"*] of the said plaintiff be quashed, &c.

[\*1144]

## \*REPLICATIONS IN BAR

Estoppel  
(g).

[*The replication of matter of estoppel commences differently from other replications, and is as follows:*]—"And the said plaintiff saith, that the said defendant ought not to be admitted or received to plead the said plea by his [secondly] above pleaded, as to so much thereof, wherein he alleges that, &c. [*stating the part of the plea to which the estoppel relates.*]"—Because he says, that, &c. [*here state the ground of estoppel either by the pleadings and verdict in a former suit, or by a bond, &c. in the forms referred to in the note (g), and conclude as follows:*] and this he the said plaintiff is ready to verify, wherefore he prays judgment if the said defendant ought to be admitted or received against the said record [*or, "against his own acknowledgment by his deed aforesaid,"*] to plead the plea by him [lastly] above pleaded in this suit, that, &c. [*stating and concluding with the allegation in that part of the plea to which the estoppel relates.*]

(f) See Tidd's Forms, 6th ed. 267.

(g) See the forms of replications of estoppel, 3 East, 848 to 351.—Willes, 10.—1 Saund. 257.—6 T. B. 62, and of rejoinders of estoppel, Carth. 65.—1 Saund. 235, n. 4. Matter of estoppel, if it appear on the record, should be demurred to, 2 Stra. 817.—2 Ld. Raym.

1550; if not, it should be pleaded, 2 B. & 662.—3 East, 846; though estoppel be pleaded, the jury may find it specially, and the court will thereupon give judgment accordingly, Com. Dig. Pleader, S. 6. Estoppel. E. 15.—2 B. & A. 662.

In the K. B. (or "C. P.")

IN  
GENERAL.

A. B. } — Term, — Will. 4.  
agt. } And the said plaintiff as to the plea of the said defendant by  
C. D. } him [first] above pleaded, and whereof he hath put himself  
upon the country, doth the like.

1 Special  
similiter  
(h).

\*And the said plaintiff as to the said plea of the said defendant by [\*1145]  
him [secondly] above pleaded, saith that the said plaintiff, by reason of  
any thing by the said defendant in that plea alleged, ought not to be  
barred from having and maintaining \*his aforesaid action thereof against  
the said defendant, because he saith that, &c.—[Here state the subject-  
matter of the replication.]

2. Com-  
mence-  
ment of a  
replication  
to a spec-  
ial plea us-  
ually call-  
ed *precludi*  
*non* (i).

In K. B. (or "C. P.")

A. B. } — Term, — Will. 4.  
v. } And the said plaintiff prays a day to imparl to the said pleas,  
C. D. } and then to reply to the same, and it is granted to him, &c. ;  
and thereupon a day is given to the parties aforesaid to come before our  
said lord the king, at Westminster, on, &c. that is to say, for the said  
plaintiff to imparl to the said pleas, and then to reply to the same, &c. at  
which day, before our said lord the king at Westminster, come as well  
the said plaintiff as the said C. D. by their attornies aforesaid, and the  
said E. F. cometh not, and hereupon the said plaintiff giveth the court  
here to understand and be informed, that after the last continuance of the  
plea aforesaid, and before this day, to wit, on, &c. at, &c. (*venue*) afore-  
said, the said E. F. died, and the said C. D. survived him, which allega-  
tion the said C. D. doth not deny, but admits the same to be true, there-  
fore let all the proceedings in this case against the said E. F. be stayed.  
And the said plaintiff as to the said plea of the said C. D. and E. F. by  
them first above pleaded, and whereof they have put themselves upon the  
country, doth the like. And the said plaintiff as to the said second plea  
&c.—[Same as in the above form.]

The like  
suggesting  
the death  
of one of  
the defend-  
ants.

And this he the said plaintiff prays may be inquired of by the country, &c.  
And this he the said plaintiff is ready to verify, wherefore he prays  
judgment, and his damages by him sustained on \*occasion of the non-  
performance of the said several promises and undertakings in the said  
declaration mentioned, to be adjudged to him, &c.

8. Conclu-  
sion to the  
country.  
4. Conclu-  
sion with a  
verification  
in assump-  
sit.

(A) When the defendant pleads only one  
plea, and concludes to the country, and the  
plea is immediately made up, the *similiter* is  
not framed in this mode, but the words, "and  
the said plaintiff doth the like," are added at  
the end of the plea, with an award of the  
verdict, Rich. C. P. 148 ; but when the plain-  
tiff does not wish immediately to proceed to  
trial, the special *similiter* is adopted ; and  
when there are several pleas, some concluding  
to the country, and others with a verification,  
the special *similiter* to all the former is pro-  
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per, inserting the words "secondly," "third-  
ly," &c. "above pleaded," &c.

(i) This is the proper mode of commence-  
ment when the replication denies or contains  
an answer to the whole of the plea, but when  
the replication contains only an answer to a  
part of the plea, it must, in the commence-  
ment, be qualified accordingly, because a repli-  
cation assuming to answer the whole of the  
plea, but in fact answering a part, is insuffi-  
cient, 1 Saund. 28, n. 3.—Com. Dig. Pleader,  
F. 25.—Ante, vol. i. Index, "Replication."

[\*1146]

## REPLICATIONS IN ASSUMPSIT.

TO USURY.  
To plea of  
usury to an  
action on a  
bill of ex-  
change,  
that the  
bill was  
indorsed  
to plain-  
tiffs with-  
out know-  
ledge of  
usury and  
for value,  
&c. (k).

[*Replications to pleas, ante, 909 a. First similiter to the general issue; second similiter, as follows:*—And the said plaintiffs as to the said plea of the said defendant by him [secondly] above pleaded to the [first] count of the second declaration saith, that they the said plaintiffs by reason of any thing by the said defendant in that plea alleged, ought not to be barred from having and maintaining their aforesaid action thereof against him the said defendant, because protesting that such usurious agreement was not made as in the said plea to the [first] count mentioned, and that the said bill of exchange in the said [first] count mentioned, was not given for such usurious consideration as in the said plea to the said [first] count mentioned for replication, nevertheless the said plaintiffs say, that the said bill of exchange in the said [first] count mentioned was indorsed to the said plaintiffs after the 10th day of June in the year of our Lord 1880, and before the same bill became due, to wit, on the day and year in the said declaration in that behalf mentioned to wit, at, &c. (*venue*) aforesaid, for valuable consideration, that is to say, for and in consideration of [the said plaintiff discounting the same and paying therefor to the said G. H. being then and there the holder thereof, a large sum of money, to wit, the amount of the said sum of money in the said bill of exchange, less the legal interest thereon, for the time which the said bill then had to run], and that they the said plaintiffs had not, at the time of the said bill being so indorsed to the said plaintiffs as aforesaid, or at the time of so discounting the same, paying such consideration for the said bill of exchange as aforesaid, at any time before actual or any notice that the said bill of exchange had been made, accepted, indorsed, or given for the usurious consideration or upon the usurious contract in the said plea to the said [first] count in that behalf mentioned, or for any usurious consideration, or upon any usurious contract whatsoever. And this, &c.—[*Conclude with a verification, as ante, 1145.*]

Denial of  
defend-  
ant's in-  
fancy (l).

[*Commencement precludi non, as ante, 1145.*—Because he saith, that the said defendant, at the time of the making of his said several promises and undertakings in the said declaration mentioned, was of the full age of twenty-one years, to wit, at, &c. (*venue*) aforesaid, and not within the age of twenty-one years, in manner and form as the said defendant hath above in his said second plea in that behalf alleged. And this the said plaintiff prays may be inquired of by the country, &c.

To plea of  
infancy,  
that the

[*Similiter to general issue, if pleaded as ante, 1144.*—And as to the said plea of the said defendant by him [secondly] above pleaded, so far as

(k) See the 58 Geo 8, c. 98.

(l) See the forms, 2 Sand 211.

the same relates to the several promises and undertakings in the said [first, second, third, fourth, and sixth (n)] counts of the said declaration mentioned, the said plaintiff saith, that he, by reason of any thing by the said defendant in that plea above alleged, ought not to be barred from having and maintaining his aforesaid action against him, in respect of the premises in those counts respectively mentioned, because he saith, that the said meat, drink, washing, lodging, and other necessaries in the said [first and second] counts of the said declarations respectively mentioned to have been found and provided by the said plaintiff for the said defendant, were, at the time of finding and providing the same, meat, drink, washing, lodging, and other necessaries, suitable to the then degree, estate, and condition of the said defendant (o), to wit, at, &c. (venue) aforesaid, and that the said goods, wares, and merchandize, in the said [third and fourth] counts of the said declaration respectively mentioned to have been sold and delivered by the said plaintiff to the said defendant were, at the time of the sale and delivery thereof, also necessaries suitable to the then degree, estate, and condition of the said defendant, to wit, at, &c. (venue) aforesaid; and that the money in the said [sixth] count of the said declaration mentioned to have been paid, laid out, and expended, by the said plaintiff to and for the use of the said defendant, was paid, laid out, and expended by the said plaintiff, in and about the purchase of necessaries, fit and suitable to the then degree, estate, and condition of the said defendant, to wit, at, &c. (venue) aforesaid. And this he the said plaintiff is ready to verify, wherefore he prays judgment, and his damages by him sustained on occasion of the not performing of the said several promises and undertakings in the said [first, second, third, fourth, and sixth] counts of the said declaration mentioned, to be adjudged to him, &c. And as to the said plea of the said defendant by him [second-] above pleaded so far as the same relates to the said several promises and undertakings in the said [fifth, seventh, and last] counts of the said declaration mentioned, the said plaintiff saith, that he will not further prosecute his suit against the said defendant in respect of the said last-mentioned promises and undertakings, or any of them; therefore as to the said last-mentioned promises and undertakings, let the said defendant be acquitted, and go thereof without day, &c.

TO  
INFANCY.

ment, &c. were necessaries, and that the money mentioned in the sixth count was paid for necessaries; and *noli prosequi* to counts for money lent, had and received, and account stated (m).

[\*1147]

*Noli prosequi, as to residue (p)*

[*Precludi non, as ante, 1145, first form.*—Because he says, that the said defendant, after the making of the said several promises and undertakings in the said declaration mentioned, and before the commencement of this suit (r), to wit, on, &c. (day of his becoming of age, but the precise day is not material,) at, &c. (venue) aforesaid, attained his age of twenty-one years. And the said plaintiff further saith, that the said defendant, after he had so attained his age of twenty-one years, and before

Ratification after defendant came of age (q).

(m) See forms, 3 Wentw. 96, and index, 1 Rich. C. P. 164.—2 Rich. C. P. 4.—3 Rich. C. P. 222.—Lil. Ent. 107; and as to this location in general, see ante, Index, vol. i. "Agency."

(n) This must depend on the nature and number of the counts in the declaration.

(o) Must show that equipage was necessary, 10 W. 1100.—Andr. 277.—Com. Dig. Plead. 2, 2 W. 12.—8 T. B. 478.—Carth. 110.

(p) No costs are payable on this *noli prosequi*, 16 East, 129.

(q) See forms, 3 Wentw. 98, 101; and see Chit. Jun. on Contr. 85, 86.—1 T. R. 648, as to the law and evidence, &c. Another preferable form is given, post, 1148. 1 M. & S. 724; 8 M. & S. 480, 1. The replication is not sustained by proof of a promise after action brought, 4 D. & R. 545.—2 B. & C. 826. S. O.

TO  
INFANCY.

the commencement of this suit (*r*), to wit, on the — day of — A. D. — at, &c. (*venue*) aforesaid, assented to, and then and there ratified and confirmed the said several promises and undertakings in the said declaration mentioned. And this, &c.—[*Conclude with a verification, as ante, 1145.*]

[\*1148]

Another form of replying to a plea of infancy, that the defendant promised after he came of age (*s*).

\*[*Precludi non, as ante, 1145.*—Because he says, that the said defendant, after the making of the said several promises and undertakings in the said declaration mentioned, and before the commencement of this suit, to wit, on, &c. (*day of becoming of age or about it*), at, &c. (*venue*) aforesaid, attained his age of twenty-one years, and that the said defendant after he had attained his age of twenty-one years, and before the commencement of this suit, to wit, on, &c. at, &c. (*venue*) aforesaid, undertook and faithfully promised, in manner and form as the said plaintiff hath above thereof complained against him. And this, &c.—[*Conclude with a verification, as ante, 1145.*]

TO ALIEN  
ENEMY.

Replication to plea of alien enemy, that plaintiff resides here by license (*t*).

TO BANK-  
RUPTCY.

To a special plea of bankruptcy, that defendant promised after he became bankrupt (*u*).

Replication to plea of bankruptcy, (*ante, 917*) under the 6 Geo. 4. c. 16, s. 59, that plaintiff proved

[*Precludi non, as ante, 1145.*—Because he says, that before and at the time of the commencement of this suit, he the said plaintiff was, and still is, resident in this kingdom, by the license and permission of our said lord the king, to wit, at, &c. (*venue*) aforesaid. And this, &c.—[*Conclude with a verification, as ante, 1145.*]

[*Precludi non, as ante, 1145.*—Because he says, that after the said defendant became and was a bankrupt, as in the said last plea alleged, and before the commencement of this suit, to wit, on, &c. at, &c. (*venue*) aforesaid, he the said defendant, in writing signed by the said defendant ratified and confirmed the said promises and undertakings in the said declaration mentioned, and undertook and then and there faithfully promised the said plaintiff to pay him the said sums of money in the said declaration mentioned. And this, &c.—[*Conclude with a verification, as ante, 1145.*]

[*Precludi non, as ante, 1145.*—Because he says, that he the said plaintiff did not prove under the said commission in the said [last] plea mentioned, the same cause of action in the said declaration mentioned as for a debt due from the said defendant to the said plaintiff, being the same debt for the recovery whereof this action is brought, nor did make his election to take the benefit of the said commission, with respect to the said debt in the said declaration mentioned, in manner and form as the said defendant hath in his said last plea alleged. And this the said plaintiff prays may be inquired of by the country, &c.

debt under a commission of bankruptcy against defendant, and thereby elected to come under the commission, denying that plaintiff proved such debt (*w*).

[\*1149]

IN  
SOLVENCY.

Replication to plea of discharge under insolvent Act.

[*Precludi non, as ante, 1145.*—Because he says, that the said defendant was not, by the order in said [last] plea mentioned, discharged according

(*r*) As to the necessity for this averment, see 1 M. & S. 724.—3 M. & S. 477.—1 D. & R. 445.—2 B. & C. 828, S. C.

(*s*) This form is given in consequence of Lord Ellenborough's observations, in 1 M. & S. 724.

(*t*) 8 Camp. 245.—See plea and notes, ante 910.

(*u*) See plea and notes, ante, 911. Question whether it would not be better to frame a replication like that to the plea of infancy, ante, 1147, 8. By the 6 Geo. 4. c. 16, s. 1, the promise must be in writing, and signed by the bankrupt, see 2 C. & P. 528.

(*w*) See plea and notes, ante, 917.



ing to the said act of parliament in the said [last] plea mentioned, of and from the said several promises and undertakings, and causes of action in the said declaration mentioned, in manner and form as the said defendant hath above in his said last plea in that behalf alleged. And this the said plaintiff prays may be inquired of by the country, &c.

INSOLVENT-  
CY."

7 Geo. 4.  
c. 57 deny-  
ing the  
defend-  
ant's dis-  
charge(x).

'And the said plaintiff, admitting the truth of the said matters by the said defendant in his said plea above alleged, prays judgment and his damages by him sustained on occasion of the non-performance of the said promises and undertakings in the said declaration mentioned, to be adjudged to him according to the form of the Statute in such case made and provided; whereupon it is considered by the court here, that the said plaintiff ought to recover his damages on occasion of the not performing of the said several promises and undertakings against the said defendant, to be levied not on the person of the said defendant, but on his lands, goods, and chattels, according to the form of the Statute in such case made and provided. But because it is unknown, &c.—[*Award of inquiry, as in Tidd's Prac. Forms, 5th ed. 213.*]

[\*1150]  
To a plea  
of Insol-  
vent Debt-  
or's Act,  
admitting  
the plea  
(y).

And the said plaintiff, as to the said plea of the said defendant by him above pleaded, saith, that the said plaintiff, by reason of any thing by the said defendant in that plea alleged, ought not to be barred from having or maintaining his aforesaid action thereof against him; because he saith, that after the day of, &c. (*the day of discharge stated in the plea,*) and after the said defendant was discharged, as in the said plea mentioned, to wit, on, &c. at, &c. the said defendant undertook, and then and there faithfully promised the said plaintiff to pay him the said sum of money in the said declaration mentioned. And this, &c.—[*Conclude with a verification, as ante, 1145.*]

To plea of  
Insolvent  
Act that  
defendant  
promised  
to pay  
plaintiff af-  
ter he was  
discharged  
out of cus-  
tody (z).

And as to so much of the said plea of the said defendant by him [lastly] above pleaded, as relates to the first count of the said declaration, and the sum of £— parcel of the several sums in the second, third, fourth, and last counts of the said declaration mentioned, the said plaintiff saith, that he, by reason of any thing by the said defendant in his said second plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against the said defendant, because the said plaintiff saith, that the said promissory note, in the said first count of the said declaration mentioned, was made and delivered by the said defendant to the said plaintiff after the supposed adjudication in the said last plea mentioned, and that the said sum of £— parcel of the said several sums of money in the said [second, third, fourth, and last] counts of the said declaration mentioned, accrued due after the said supposed adjudi-

To plea  
under In-  
solvent  
Act, that  
the prom-  
issory note  
was given,  
and other  
debts con-  
tracted af-  
ter plain-  
tiff's dis-  
charge un-  
der the act  
(a).

[\*1151]

(x) See the plea, ante, 919. As to the question, see 3 Taunt. 227; it should be right. In a late case it was held, that where a defendant pleads that he was "duly discharged" under the Insolvent Debtors' Act, the plaintiff in his replication denies the discharge *modo et forma*, it is sufficient for the defendant to prove the order of adjudication for his discharge, and it is not necessary to prove the fact of his having filed his petition,

although that fact is essential to give the court jurisdiction, 4 C. & P. 274.

(y) But note, such a replication would be improper to a plea, under the 7 Geo. 4, c. 57, s. 61, which gives the plea in bar to the action *entirely*.

(z) See plea, ante, 919.

(a) See plea, ante, 921, and notes; and 2 M. & S. 551.

TO INSOL-  
VENT DEBT-  
ORS' AOT.

cation, to wit, at, &c. (*venue*) aforesaid. And this he the said plaintiff is ready to verify, wherefore he prays judgment, and his damages by him sustained on occasion of the premises in the introductory part of this replication mentioned, to be adjudged to him, &c.; and the said plaintiff saith, that he will not further prosecute his suit against the said defendant as to the residue of the said several sums of money in the said [second, third, and last] counts of the said declaration mentioned; therefore, &c.

TO TENDER.  
Denial of  
tender (b).

[*Similiter to the general issue, as ante, 1144, first form.*]—As to the said plea of the said defendant by him above pleaded as to the said sum of £— parcel, &c. the said plaintiff saith, that he, by reason of any thing by the said defendant in that plea above alleged, ought not to be barred from having and maintaining his aforesaid action thereof against him, to recover further damages than the said sum of £— parcel, &c. in this behalf.\* Because he saith, that the said defendant did not tender or offer to pay to the said plaintiff the said sum of £— parcel, &c. in manner and form as the said defendant hath above in his said plea in that behalf alleged, and this the said plaintiff prays may be inquired of by the country, &c. And as to the said plea of the said defendant by him lastly above pleaded, the said plaintiff saith that he, by reason of any thing by the said defendant in that plea above alleged, ought not to be barred from having and maintaining his said action thereof against him; because he saith, that he not nor is indebted to the said defendant in manner and form as the said defendant hath in his said last plea above alleged. And this the said plaintiff also prays may be inquired of by the country, &c.

*Nil debet*  
to the plea  
of set-off.  
(c).

[\*1152]

A writ is-  
sued out of  
K. B. or  
C. P. be-  
fore the  
tender (d).

[*Similiter to the general issue, as ante, 1144, first form, and preclud-  
non, as in the above form, to the asterisk.*]—Because he saith, that after the making of the said promises and undertakings in the said declaration mentioned, as to the said sum of £— and before the making of the said sup-  
posed tender in the said plea mentioned, to wit, on, &c. (*the teste of the writ, (e),*) he the said plaintiff, for the recovery of his damages, by him sustained, by reason of the not performing the said several promises and undertakings in the said declaration mentioned, as to the said sum of £— parcel, &c. sued and prosecuted out of the court of our said lord the king &c.—[*State the issuing of the Bill of Middlesex, or latitat, or special original, or capias, out of the King's Bench or Common Pleas, as ante, 442 to 451, examining with the writ actually issued in each particular case.*] And the said plaintiff further saith, that the said precept (or, "writ of latitat," &c.) was so sued and prosecuted by the said plaintiff against

(b) See the plea, ante, 922; and precedents of replications, 3 Wentw. Index, xv. &c. and see replications, 2 M. & S. 551. If the plea was of a tender, "before the exhibiting of the said bill," instead of "commencement of this suit," and there was in fact a tender between the issuing of the writ and the time to which the title of the declaration relates, then the issuing of the writ must be replied specially, as post, 1152. See 5 B. & A. 452.

(c) See the plea, ante, 931.

(d) See the forms, 1 Wils. 141.—3 Went. 179, and of the rejoinder to the above replication, 1 Wils. 142. In the common pleas,

the plaintiff may reply a *capias*, without an original writ first sued out to a plea of tender, 2 Saund. 1, in notes; and as to the replication in general, see *Id.* and ante, 1144, 922. This replication does not seem necessary if the plea is, of a tender "before the commencement of this suit," instead of "exhibiting this bill," see 5 B. & A. 452.

(e) If the actual day of issuing the writ can be readily ascertained, it may be admissible to insert it instead of the *teste*, in order to prevent the delay occasioned by a special rejoinder, 3 Wentw. 108, in the notes, and 1 Wils. 142.

the said defendant as aforesaid, with intent to implead the said defendant upon and for the said several causes of action in the said declaration mentioned, as to the said sum of £— parcel, &c. and to cause him to appear in the said court here, and upon his said appearance to declare against him for the said several causes of action in the said declaration mentioned, as to the said sum of £— parcel, &c. And the said plaintiff further saith, that, according to his intent, the said plaintiff afterwards, to wit, in — Term, in the — year of the reign of our said lord the king, exhibited his said bill, and declared thereon \*against the said defendant as aforesaid, to wit, at, &c. (*venue*) aforesaid. And the said plaintiff further saith, that the said defendant did not, at any time before the suing forth of the said precept, [*or, "writ," or, if several writs be mentioned, "the said first-mentioned writ,"*] tender or offer to pay to the said plaintiff the said sum of £— parcel, &c. And this the said defendant is ready to verify, wherefore he prays judgment, and his full damages which he hath sustained by reason of the non-performance of the said several promises and undertakings, as to the said sum of £— parcel, &c. to be adjudged to him, &c.

TO TENDER.

[\*1153]

[*Same as the above form, to the end of the statement of the writ at the asterisk, and then proceed as follows:*]—At which day, that is to say, on, &c. (*the return day of the writ,*) in the court of our said lord the king, before the king himself, [*or in C. P. "before the said justices of our said lord the king of the Bench,"*] at Westminster aforesaid, came the said plaintiff by — his attorney, and offered himself against the said defendant in the plea and bill [*or, if in C. P. omit the words "and bill"*] aforesaid, and the said sheriff of — to wit, — esq. at that day returned to the said court, that the said defendant was not found in his bailiwick; nor did the said defendant come or appear in the said court of our said lord the king, before the king himself, [*or, in C. P. "before the said justices of the Bench,"*] according to the exigency of the said writ. Whereupon the said plaintiff prayed another writ of our said lord the king, to be directed to the sheriff of the said county of — in form aforesaid, and it was granted to him, returnable before our said lord the king at Westminster aforesaid, [*or, in C. P. "before the justices of our said lord the king of the Bench aforesaid,"*] on, &c. (*the first special or general return-day in the ensuing term, depending on the nature of the proceedings, whether by original or by bill,*) for the said defendant to answer to the said plaintiff in the plea aforesaid; the same day was given to the said plaintiff there, &c. At which day, that is to say, on, &c. (*the return-day last-mentioned*) in the court of our said lord the king, before the king himself [*or, in C. P. "before the justices of our said lord the king of the Bench aforesaid,"*] at Westminster aforesaid, came the said plaintiff by his attorney aforesaid, and offered himself against the said defendant in

A writ with continuances (*f*).

Return non est inventus

[\*1154]

(*f*) See the form, 3 Went. 178, in which, however, the return of the first process is not needed; but according to the replications to a writ of the Statute of Limitations, where the plaintiff replies more than one process, the return should be stated to have been returned, 2 Saund. 68 d. e.—Wills. 255.—2 B. & P. 37, and the forms and cases there cited; observe the notes to the preceding form. An *ac return* writ is a good continuance of common

process, and the continuance need not be by *alias* and *pluries* writs, 4 B. & C. 625. The continuances need not be stated when the action is by original, 1 Wils. 167, 8. When once a writ is returned, the subsequent continuances may be entered at any time, and need not be proved on the trial. 6 T. R. 617. 5 B. & A. 452. As to when return may be made, 5 B. & A. 489.

TO TENDER. the plea aforesaid. And the said sheriff of — did not send the said last mentioned writ, nor did he do anything thereupon, nor did the said defendant come or appear in the said court of our said lord the king, before the king himself [or, *in C. P.* "before the said justices of the Bench,"] according to the exigency of the said last-mentioned writ. Whereupon the said plaintiff prayed another writ of our said lord the king, to be directed to the sheriff of the said county of — in form aforesaid, and it was granted to him, returnable before our said lord the king at Westminster, [or, *in C. P.* "before the justices of our said lord the king of the Bench aforesaid,"] on — (*g*), for the said defendant to answer to the said plaintiff in the plea aforesaid, the same day was given to the said plaintiff there, &c. At which day, (that is to say) on, &c. in the court of our said lord the king, before the king himself, [or, *in C. P.* "before the justices of our said lord the king of the Bench aforesaid,"] at Westminster aforesaid, came the said plaintiff by his attorney aforesaid, and the said defendant by — his attorney, also came, according to the exigency of the said last-mentioned writ. And the said plaintiff offered himself on the fourth day against the said defendant in the plea aforesaid. As by the record and proceedings thereof remaining in the said court of our said lord the king, before the king himself, [or, *if in C. P.* "before the justices of our said lord the king of the bench aforesaid,"] more fully and at large appears. And the said plaintiff further saith, that the said several writs were respectively so sued and prosecuted by him the said plaintiff, against the said defendant as aforesaid, with intent, &c.—[*Same as the last form to the asterisk, ante, 1152, to the end.*]

*A prior demand of the debt* (h). [ \*1155 ] [*Similiter to the general issue, as ante, 1144. To plea of tender, precludi non, as ante, 1151, to the asterisk.*]—Because he \*saith, that the said defendant was not always, from the time of making the said promises and undertakings in the said declaration mentioned, ready and willing to pay the said sum of £— parcel, &c. to the said plaintiff, in manner and form as the said defendant hath in his said plea above alleged, but on the contrary thereof the said plaintiff saith, that after the making of the said promises and undertakings in the said declaration mentioned, as to the said sum of £— parcel, &c. and after the time when the said causes of action in the said declaration mentioned, accrued to the said plaintiff in respect thereof, and before the said defendant did tender and offer to pay the same as in his said plea in that behalf is above alleged, to wit, on, &c. at, &c. (*venue*) aforesaid, the said plaintiff demanded the said sum of £— parcel, &c. of and from the said defendant, and then and there requested him to pay the same unto the said plaintiff, but the said defendant did not nor would then pay the same or any part thereof unto the said plaintiff, but then and there wholly neglected and refused so to do, and then and there unjustly detained the same from the said plaintiff; by reason whereof

(*g*). There is no occasion in the different continuances to mention the year of the reign, 4 T. R. 205.

(*h*) As to this replication, see 8 East, 168. —1 Saund. 33, n. 2.—Bul. N. P. 155.—1 Campb. 478.—Chit. jun. contr. 807. A prior demand of a larger sum will not support

this plea, see 5 B. & A. 630.—1 Esp. Rep. 115. —1 Camp. 181.—*Quare*, if a personal demand be not necessary, Ry. & Moody, C. N. P. 360. —See a replication to a plea in an action on a bill of exchange, stating that the bill was presented when it fell due, 8 East. 168.

the said plaintiff then and there sustained damages by reason of the non-payment of the said sum of £— parcel, &c. in manner and form as he the said plaintiff hath above in his said declaration in that behalf alleged, to wit, at, &c. (*venue*) aforesaid. And this the said plaintiff is ready to verify, wherefore he prays judgment and his full damages by him sustained, by reason of the non-payment of the said sum of £— parcel, &c. to be adjudged to him, &c.

[*Similiter to the general issue, as ante, 1144. The plea of tender, precludi non, as ante, 1151, to the asterisk.*]—Because he saith, that after making of the said tender in the said last plea mentioned, and before the exhibiting of the said bill, to wit, on, &c. at, &c. (*venue*) aforesaid, the said plaintiff demanded of and requested the said defendant to pay to the said plaintiff the said sum of £— parcel, &c. in the said last plea mentioned, but the said defendant then and there wholly refused, and hath thence hitherto wholly refused, to pay the same or any part thereof to the said plaintiff, to wit, at, &c. (*venue*) aforesaid. And this the said plaintiff is ready to verify, wherefore he prays judgment and his damages by reason of the non-payment of the said sum of £— to be adjudged to him, &c. [1156]

A subsequent demand (i).

[*Similiter to the general issue, as ante, 1144.*] And the said plaintiff, inasmuch as he cannot deny but that the said defendant did tender and offer to pay to the said plaintiff the said sum of £— parcel, &c. in manner and form as the said defendant hath above in his said plea in that behalf alleged, freely takes and accepts the same out of court here, wherefore as to the said sum of £— the said plaintiff is satisfied; and in order to try the said issue above joined between the parties aforesaid, at a jury thereupon come before our said lord the king at Westminster, on — next after —, [*some return day before the trial; and if the trial is to be at the assizes or sittings after Term, the last return day of the preceding Term,*] by whom, &c. and who neither, &c. to recognize, &c. because as well, &c. the same day is given to the parties aforesaid, at the same place.

Similiter to general issue, admission of tender, and award of venire to try the issue (k).

[*If the proceedings are by original, then say,* “and in order to try the said issue above joined between the parties aforesaid, the sheriff is commanded that he cause to come before our said lord the king, on — wherever our said lord the king shall then be in England, twelve, &c. by whom, &c. and who neither, &c. to recognize, &c. because as well, &c. the same day is given to the parties aforesaid, &c.”]

TO ACCORD AND SATISFACTION. To plea of accord and satisfaction denial of the delivery of the bond, &c. (l).

[*Precludi non, as ante, 1145, first form.*]—Because he saith, that the said defendant did not deliver [or, *if a bond be pleaded, say,* “make and seal, and as his act and deed deliver to the said plaintiff, the said pipe of wine, [or, “the said supposed writing obligatory,” in the said plea mentioned, in full satisfaction and discharge of the said several

[1157]

(i) See the form, 3 Wentw. 180. What subsequent demand is sufficient, 1 Campb. 181. To support this issue the plaintiff must prove demand of the precise sum tendered, 5 Barn. Akl. 630.

plaintiff admits a tender can be proved, and when the plaintiff is prepared to prove more to be due.

(l) See the forms, 1 Lil. Ent. 105, 106, 499.—Plead. A. 246.—Morg. Prec. 238. 8 Wentw. 135, and Id. Index, vi. It has been

**TO ACCORD AND SATISFACTION.** promises and undertakings in the said declaration mentioned ; in manner and form as the said defendant hath above in his said plea in that behalf alleged. And this the said plaintiff prays may be inquired of by the country, &c.

**To a plea of delivery of a bill of exchange, accepted by defendant in payment, stating a presentment and dishonor thereof (m).** [*Precludi non, as ante, 1145.*—Because he saith, that the said bill of exchange, in the said plea mentioned, bore date on a certain day and year therein in that behalf mentioned, that is to say, the [19th] day of [February,] in the year of our Lord [1828,] and that the same became due and payable long before the commencement of this suit ; and the said plaintiff further saith, that after the said bill became due and payable, according to the tenor and effect thereof, and before the commencement of this suit, to wit, on the [22d] day of [July,] in the year aforesaid, to wit, at, &c. (*venue*) aforesaid, the said bill of exchange was shown and presented to the said defendant for payment thereof, but that he the said defendant did not nor would, when he was so requested as aforesaid, or at any other time before the commencement of this suit, pay the said sum of money in the said bill specified, or any part thereof, but wholly neglected and refused so to do, and the said sum of money, in the said bill mentioned, at the time of the commencement of this suit, was and still is wholly due and unpaid ; and the said plaintiff, at the time of the commencement of this suit, was and still is the holder of the said bill, to wit, at London aforesaid. And this the said plaintiff is ready to verify, &c.—[*Conclude with a verification, as ante, 1145.*]

**TO AWARD AND ARBITRAMENT.** [*Precludi non, as ante, 1145, first form.*—Because he saith, that the said arbitrator did not make any such award of and concerning the premises, in manner and form as the said defendant hath above in his said plea in that behalf alleged. And this the said plaintiff prays may be inquired of by the country, &c.

**To a plea of arbitrament, denying the award (n).** [*Precludi non, as ante, 1145, first form.*—because he saith that there is (p) not any record of the said supposed recovery in the said plea mentioned, remaining in the said court of our said lord the king, before the king himself, [or, in *C. P.* "of the Bench aforesaid,"] at Westminster aforesaid, in manner and form as the said defendant hath above in his said plea alleged, and this he the said plaintiff is ready to verify \* when, where, and in such manner as the court here shall order, direct, or appoint, and because the court of our said lord the king now here, [or in

**Null tiel record, to plea of judgment recovered in same court (o).**

usual to protest the delivery and traverse the acceptance, (Morg. 238. Stephen on Pleading, 236;) and this is proper where there has in fact been a delivery, but no acceptance in satisfaction, but in other cases the above form seems most correct, though either form will suffice, Bac. Ab. Accord, C. and Com. Dig. Accord, O.—5 Mod. 86.—Lil. Ent. 105.—Bro. Rep. 98.—Bro. Vad. Mec. 92. 1 Stra. 23.—Sty. 239. Where a bill or note has in fact been given in payment, and is so pleaded, the replication must not traverse the delivery or acceptance in satisfaction, but must state the dishonor of such bill when the same became due, and if the defendant were drawer or indorser, should aver that he had notice thereof; and see the next form.

(m) See the plea and notes, ante, 928.

(n) See the plea, ante, 927, 469, and the forms of replications, 8 Wentw. Ind. viii.—Clift. Ent. 196. The replications usually protest the facts of the plea not immediately denied, but this seems unnecessary, and the replication may at once deny the fact intended to be put in issue, see the general rule, 1 Saund. 103 b.

(o) See the forms, Tidd's Prac. forms, 6th edit. 308.—1 Rich. C. P. 206.—2 Id. 20.—3 Went. Index, ix.—1 Saund. 92, n. 3, and Tidd's Prac. 9th edit. 717, 742. See pleas, ante, 929.

(p) This is sufficient without averring there was no record at the time of the plea

at P. "before the justices of the Bench," will advise themselves upon the inspection and examination of the said record, by the said defendant, in his said plea alleged, a day is given to the parties aforesaid, before our said lord the king, [or, in C. P. "before the justices of the Bench,"] at Westminster aforesaid, until — next after — [or, by original, until "— wheresoever, &c." or in C. P. "until —,"] to hear the [\*1158] judgment of said court thereupon, for that the said court of our said lord the king now here, are not yet advised thereof, &c.

TO JUDG-  
MENT RE-  
COVERED.

[Same as in the above form, to the asterisk.]—And hereupon the said defendant is commanded that he have the said record before our said lord the king, [or, in C. P. "before the justices of the Bench,"] at Westminster, on — next after —, [or, by original, "on —, wheresoever, &c. or in C. P. on —,"] and that he fail not at his peril, the same day is given to the said plaintiff here, &c. [or, by original, at the same place, &c."]

The like to a plea of judgment recovered in another court (q).

[Precludi non, as ante, 1145.]—Because he saith, that the said several promises and undertakings in the said declaration mentioned, were not, nor was any or either of them, any of, or any one of the same identical promises and undertakings as those or any of those in the said plea, mentioned, and for and in respect whereof the said supposed judgment in the said plea mentioned was recovered, in manner and form as the said defendant hath above in his said plea alleged. And this the said plaintiff says may be inquired of by the country, &c.

To a plea of judgment recovered, denying that it was for the same cause of action (r).

[Precludi non, as ante, 1145, first form.]—Because he saith, that the said supposed writing of release, in the said last plea mentioned, was not, nor is the deed of him the said plaintiff. And this the said plaintiff says may be inquired of by the country, &c.

TO RELEASE.  
To a plea of release, non est factum (s).

[Precludi non, as ante, 1145, first form.]—Because he saith, that the said supposed writing of release, in the said plea mentioned, was had and obtained from the said plaintiff by the fraud and covin of the said defendant, to wit, at, &c. (venue) aforesaid. And this, &c.—[Conclude with a verification, as ante, 1145.]

To a plea of release, that it was obtained by fraud (t) (1).

[Similiter to the general issue, as ante, 1145, and precludi non, as ante, 1145, first form.]—Because he saith, that he the said plaintiff was

TO SET-OFF.  
To a plea of set-off, nil debet (u).

(q) See the forms, and the law referred to the note to the last form, and ante, 929, &c.; and 1 Rich. C. P. 208—Morg. 253. Plaintiff may pray that the court will inspect record without giving defendant an opportunity to rejoin by traversing the record, 7 Inst. 80.—2 Marsh. 854, S. C.—2 B. & P. 1 Saund. 92 a.

(r) That plaintiff may reply this, see 3 B. 235.—6 T. R. 607; and see form of new judgment, post, 1218.—See the notes, ante,

(s) See the forms, 8 Wentw. Index, xii. and a different form, 2 Rich. C. P. 71.

(t) Replication that release was obtained by duress, 2 Rich. C. P. 78.

(u) See the form, Morg. 251.—Where in assumpsit, for goods sold and delivered, the defendant pleaded a set-off for more money due to him from the plaintiff, and plaintiff replied that the goods were to be paid for in ready money, the replication was holden bad on demurrer, as being no answer to the plea, 1 East, 375.

TO SET-OFF. not nor is indebted to the said defendant in manner and form as the said defendant hath above in his said last plea in that behalf alleged. And this the said plaintiff prays may be inquired of by the country, &c.

To a plea of set-off on a recognizance enrolled, and simple contract *nul tiel record, and nil debet* (w).  
 [\*1159] [*Precludi non, as ante, 1145, first form.*—Because as to so much of the said plea of the said defendant, by him secondly above pleaded, as relates to the said sum of £—, therein alleged to be due and owing from the said plaintiff to the said defendant, on the said supposed recognizance in that plea mentioned, the said plaintiff saith, that there is not any such record of the said supposed recognizance in the said plea mentioned, remaining of record in the said court of our said lord the king, before the king himself, [or, in *C. P.* “of the Bench aforesaid,”] in manner and form as the said defendant hath above in his said plea in that behalf alleged, and this he the said plaintiff is ready to verify, when, where, and in such manner as the said court shall here direct and award.—[*Here insert the time for the production of the record in the same or another court, as in the forms, ante, 1158, 9, and then proceed as follows:—*And the said plaintiff as to the residue of the said plea of the said defendant, saith, that he was not nor is indebted to the said defendant in the said sum of £—, or any part thereof, in manner and form as the said defendant hath above in that part of his said plea in that behalf alleged; and this the said plaintiff prays may be inquired of by the country, &c. And the said defendant doth the like, therefore, &c.—[*Award of venire by bill or original, as ante, 1156.*]

Statute of limitations to a plea of set-off (x). [*Precludi non, as ante, 1145, first form.*—Because he saith, that the said several supposed debts and causes of set-off in the said [last] plea mentioned, did not, nor did any or either of them, arise or accrue to the said defendant at any time within six years next before the exhibiting of the bill of the said plaintiff in this suit, [or, if in *C. P.* or by original, “the commencement of this suit,”] in manner and form as the said defendant hath above in his said [last] plea in that behalf alleged. And this, &c.—[*Conclude with a verification, ante, 1145.*]

COURT OF CONSCIENCE ACT.  
 To a plea of Court of Conscience Act, defendant indebted in more than 40s. (y).  
 [\*1160] [*Precludi non, as ante, 1145, first form.*—Because he saith, that the said defendant, at the time of the commencement of the said action of the said plaintiff was indebted to the said plaintiff upon and by virtue of each and every of the said several promises and undertakings in the said declaration mentioned, in a larger sum than the sum of 40s. to wit, in the said sum of £—, in each and every of the said respective counts of the said declaration mentioned, in manner and form as he the said plaintiff hath above in his declaration in that behalf complained against the said defendant, to wit, at, &c. (*venue*) aforesaid. And this the said plaintiff prays may be inquired of by the country, &c.

(w) See plea, ante, 985. As to this replication, see 1 East, 869. The replication of *nul tiel record* is unnecessary and improper unless the plea state the recognizance is enrolled of record, ante, 986; if it does not, *nil debet* is sufficient, 1 B. & A. 158.

(x) In the late case in 1 Crompt. & Jerv. 1, it was fully established that the statute of Limitations must be replied specially to a plea

of set-off, and cannot be taken advantage of under the general replication of *nil debet*. The above form of replication is sufficient, 2 Str. 127; but where there are mutual accounts, it will be seldom available, 6 T. R. 189.—See plea of statute, ante, 940.

(y) See the plea, ante, 989; and forms of replications, 3 Wentw. Index, xviii.—Com. Dig. County, C. 8.



[*Precludi non, as ante, 1145, first form.*]—Because he saith, that the said defendant did, within six years next before the exhibiting of the bill of the said plaintiff in this behalf [or in *C. P. or by original*, “before the commencement of the suit,”] undertake and promise in manner and form as he the said plaintiff hath above thereof complained against him, to wit, at, &c. (*venue*) aforesaid. And this he the said plaintiff prays may be inquired of by the country, &c.

TO STATUTE OF LIMITATIONS.

To plea of *non assumpsit infra sex annos*, that defendant did undertake, &c. (z).

[*Precludi non, as ante, 1145, first form.*]—Because he saith, that the said several causes of action in the said declaration mentioned, and each and every of them, did accrue to the said plaintiff within six years before the exhibiting of the said bill of the said plaintiff, [or, “next before the commencement of this suit,”] [*following the language of the plea*] in manner and form as the said plaintiff hath above complained against the said defendant, to wit, at, &c. (*venue*) aforesaid. And this the said plaintiff prays may be inquired of by the country, &c.

To plea of *actio non accrevit infra sex annos* that the cause of action did accrue, &c. (a).

[*Precludi non, as ante, 1145, first form.*]—Because he saith, that within six years next after the said several causes of action in the said declaration mentioned accrued, and each and every of them did accrue, to the said plaintiff, to wit, on, &c.—[*Here state the issuing of the process out of K. B., C. P., or Exchequer, and the proceedings thereon, and the purpose for which they were issued, and that the plaintiff declared on the writ, as in the replications to the pleas of tender, ante, 1152, 3, mutatis mutandis, and then proceed as follows:*]—And the said plaintiff further saith, that the said several causes of action in the said declaration mentioned, and each and every of them did accrue to the said plaintiff within six years next before the issuing of said first-mentioned precept [or writ] out of the said court of our said lord the king here, in manner and form as the said plaintiff hath above thereof complained against the said defendant. And this, &c.—[*Conclude with a verification, as ante, 1145.*]

[\*1161] A writ sued out within six years (b).

[*Precludi non, as ante, 1145, first form.*]—Because he saith, that at

That plaintiff was abroad and the action was commenced within six years after his return (c).

(z) See the plea, ante, 940; and see form of replication, 1 Rich. C. P. 149.—2 Id. 84.—Mory. 218. If the time when the process was issued be material, it must be replied specially as in the case of a tender, ante, 1152, 3; see the following forms, and 2 Saund. 1, note 1; and d. e. So if the infancy of the plaintiff, &c. be material, 6 T. R. 198.—2 Saund. 127, note 1. The plaintiff may give in evidence a promise after action brought, 2 Burr. 1099, reversed in 4 D. & R. 545.—2 B. & C. 826, &c.

note to the last form, and a form, 1 Rich. C. P. 149.—Plead. A. 452.—See plea, ante, 941.

(b) When this is necessary, see supra, note d. See a precedent of one writ issued, 2 Burr. 654—1 Wils. 141.—3 Wentw. 208.—Id. Index, xx. ante, 1152 and of a writ with continuances, ante, 1153. Lil. Ent. 32. 104.—Thomp. Ent. 151.—3 T. R. 662.—3 Wentw. Index, xx. When continued process is pleaded, the first must be shown to have been returned, see ante, 1153, n. f.—2 Saund. 68 d, e, f, g.—7 T. R. 7, 6 T. R. 617; and 2 B. & P. 127.—5 B. & A. 489; and 2 Saund. 1, n. 1, where see the mode of replying a writ in general. An *ac etiam* writ is a good continuance of common process, and the continuance need not be by *alias* and *pluries* writs, 4 B. & C. 625.—7 D. R. 25, 3. C. The continuance may be entered at any time, 6 T. R. 617.—5 B. & A. 452. As to when return may be made, 5 B. & A. 489.

(c) This form is adopted when in fact the bill was filed within six years. If the plaintiff relies on the issuing of the writ, it must be replied specially, unless indeed the defendant in the plea avers that the causes of action did accrue within six years “before the commencement of this suit,” 5 B. & A. 452. 1 D. & R. 27, 8. C. This plea will suffice in an action at the suit of an administrator, when the cause of action did not accrue till after taking out administration, 5 B. & A. 204. See the

(c) See the form, 3 Wentw. 205. This replication is founded on the statute of 21 Jac. 1. c. 16, s. 7, see 2 Saund. 121 a, b. See the

TO STATUTE  
OF LIMITA-  
TIONS.

the time when the said several causes of action in the said declaration mentioned, and each and every of them (*d*) did accrue to the said plaintiff, the said plaintiff was in parts beyond the seas, to wit, at, &c. (*venue*) and that the said plaintiff afterwards, to wit, on, &c. returned from the said parts (*d*) beyond the seas into this kingdom, and which said return of the said plaintiff was his first return into this kingdom from the said parts beyond the seas, after the accruing of the said causes of action, and every of them (*d*) to the said plaintiff, and that the said plaintiff exhibited his said bill against the said defendant within six years next after the said plaintiff's first return into this kingdom \*from beyond the seas, after the accruing of the said several causes of action aforesaid, or any of them, unto the said plaintiff. And this, &c.—[*Conclude with a verification, as ante, 1145.*]

[\*1162]

The like in  
another  
form.

[*Precludi non, as ante, 1145, first form.*—Because he saith, that at the time when the said several causes of action in the said declaration mentioned, and each and every of them did accrue to the said plaintiff, he the said plaintiff was in parts beyond the seas, to wit, at, &c. (*venue*): and that the said plaintiff did not at any time from the time the said causes of action accrued, and each and every of them did accrue, until within six years of the day of exhibiting the said plaintiff's bill, come or return into this kingdom. And this, &c.—[*Conclude with a verification, as ante, 1145.*]

That de-  
fendant  
was abroad  
and the ac-  
tion was  
commenced  
within  
six years  
after his  
return (e).

[*Precludi non, as ante, 1145, first form.*—Because he saith, that the said defendant, before and at the time when the said several causes of action in the said declaration mentioned, accrued to the said plaintiff, was in parts beyond the seas, to wit, at —, and that the said defendant afterwards, to wit, on, &c. returned from the said parts beyond the seas into this kingdom; which said return of the said defendant was his first return into this kingdom from the said parts beyond the seas, after the accruing of the said several causes of action, and each and every of them (*f*), to wit, at, &c. (*venue*) aforesaid. And the said plaintiff further saith, that the said plaintiff exhibited his bill in this cause, and brought his said action thereupon against the said defendant, within six years after his the said defendant's first return into this kingdom, after the accruing of the said several causes of action, and each of them, to wit, at, &c. (*venue*) aforesaid. And this, &c.—[*Conclude with a verification as ante, 1145.*]

Replica-  
tion in an  
action by  
executors  
to a plea of  
Statute of  
Limita-  
tions that  
the testa-  
tor com-

[*Precludi non, as ante, 1145, first form.*—Because they say, that heretofore, and in the life-time of the said J. D., to wit, on the [10th day of May, A. D. 1825.] the said defendant in this suit, being indebted to the said J. H. in respect of the said several promises, undertakings and causes of action in

note to the next form but one. See a form where the writ was issued out with continuances six years after the return, 4 B. & C. 625.—7 D. & R. 25, S. C.

(*d*) It seems best to insert these words, though the omission is, if at all, only objectionable on special demurrer, 4 B. & C. 634.—7 D. & R. 25, S. C.

(*e*) See the forms, 1 Wentw. 827. This replication is founded upon the 4 Ann. c. 16, s. 19, and not on the 21 Jac. 1, c. 16. See 2 Saund. 121, a, b. If the defendant were in

this kingdom at the time the cause of action accrued, this replication will be insufficient, for when once the Statute of Limitations begins to run, no subsequent disability prevents its operation, 1 Wils. 134.—4 T. R. 810; and see 19 Ves. 200.—See 1 Show. 99.—1 Saund. 420.—Carth. 187.—19 Ves. 200; and see the authorities and notes collected in 1 Chit. Col. Stat. 795 and 4 Bing. 686.

(*f*) See 4 B. & C. 625.—7 D. & R. 25, S. C.—*Supra*, note g.

in the said [first, third, fourth, and fifth] counts of the said declaration mentioned, for the recovery of his damages sustained on occasions of the non-performance by the said defendant of the said several promises and undertakings in the said [first, third, fourth and fifth] counts of the said declaration mentioned, sued and prosecuted out of the court of our said lord the king, before the king himself, a certain precept [*or writ*] of our said lord the king, called a [bill of Middlesex,] whereof the sheriff of [Middlesex] was commanded that he should take the said defendant if he should be found in his bailiwick, and that the said sheriff should keep him the said defendant, so that he might have his body before our said lord the king at Westminster, on [Wednesday] next after [five weeks from Easter-day] then next following, to answer to the said J. H. in a plea of trespass, and that the said sheriff should then have there that [precept] which said [precept] so sued out and prosecuted as aforesaid was so sued out and prosecuted as aforesaid, out of the said court, by the said J. H. with intent that the said defendant might, by virtue thereof, appear at the return of the said [precept,] and that the said J. H. might thereupon declare against him upon and for the said several promises and undertakings and causes of action in the said [first, third, fourth, and fifth] counts of the said declaration in this suit above mentioned, at which day of the return of the said [precept,] that is to say, on [Wednesday] next after [five weeks from Easter-day, A. D. 1825] aforesaid, before our lord the king at Westminster, came the said J. H. by C. L. his attorney, and according to his said intent offered himself against the said defendant, in the said plea; and the said defendant also at that day appeared also in the said court there, according to the tenor of the [precept] aforesaid, to answer to the said J. H. according to the exigency of the said [precept]. And thereupon the said J. H. according to the said intent, afterwards, to wit, in that same [Easter] Term, A. D. [1825] aforesaid, exhibited his bill, and by his said attorney declared against the said defendant in a plea of trespass on the case, upon promises, of and for the not performing of the same identical promises and undertakings in the said [first, third, fourth, and fifth] counts of the said declaration in this action above mentioned. And the said defendant thereupon, afterwards, to wit, in [Trinity] Term, in the year last aforesaid, pleaded to the said declaration of the said J. H. and the said suit was continued depending and undetermined, until the said J. H. afterwards, and before the said plea was determined, and within six years next before the exhibiting of the said bill of the said plaintiffs as executor and executrix as aforesaid, against the said defendant in this behalf, to wit, on the [27th] day of [January, A. D. 1827,] died, to wit, at, &c. (*venue*) aforesaid; and thereupon the said suit of the said J. H. was thereby abated, and the said proceedings therein ceased, and were and are wholly determined, discontinued, and ended. And the plaintiffs, executor and executrix as aforesaid further say, that they the said plaintiffs, as executor and executrix as aforesaid, afterwards, and within a reasonable time after and within the space of much less than a year next after the death of the said J. H., to wit, on the [12th] day of [November, A. D. 1827,] for the recovery of damages sustained by them as ex-

TO STATUTE  
OF LIMITA-  
TIONS.

menced an  
action  
within six  
years  
which  
abated by  
death, and  
that within  
a year after  
the  
present ac-  
tion was  
commenced  
by  
plaintiffs  
as execu-  
tors (g).

(g) As to this plea, see 2 Saund. 64, notes. East, 409.—Tidd, 9th ed. 28. See form of re-  
—1 Wentw. 257 —3 Id. 204, 294.—1 Salk. 28. joinder, post, 1162.  
—2 Ld. Raym. 1101 —Bul. N. P. 150.—3

STATUTE OF  
LIMITA-  
TIONS.

executor and executrix as aforesaid, by reason of the non-performance of the said promises and undertakings in the said [first, third, fourth, and fifth] counts of the said declaration in this action above mentioned, sued and prosecuted out of the said court of our said lord the king, before the king himself, a certain [precept] of our said lord the king, called a [bill of Middlesex,] whereby the sheriff of [Middlesex,] was commanded that he should take the said defendant if he should be found in his bailiwick, and that the said sheriff should keep him safely, so that he might have his body before our lord the king at Westminster, on [Wednesday] then next after [the Morrow of St. Martin,] to answer to the plaintiffs, executor, and executrix as aforesaid, in a plea of trespass, and that the said sheriff should then have there that [precept,] which said writ and precept were so sued out and prosecuted by the said plaintiffs, executor and executrix as aforesaid, with intent to implead the said defendant upon and for the said several causes of action in the [first, third, fourth, and fifth] counts of the said declaration in this suit above mentioned, and to cause him to appear in the said court here, and upon such appearance to declare against the said defendant, for the said several causes of action in those counts mentioned. And the said plaintiffs, executor and executrix as aforesaid, further say, that at the return of the said last-mentioned [precept,] the said plaintiffs, as executor and executrix aforesaid, according to their said intent, exhibited their said bill, and by T. G. their attorney declared thereon against the said defendant in manner and form aforesaid. And the said plaintiffs, executor and executrix as aforesaid, aver that the said several causes of action in the said [first, third, fourth, and fifth] counts of the said declaration in this suit mentioned, did accrue to the said J. H. within six years next before the suing out of the said first mentioned [precept] by the said J. H. as aforesaid. And this they the said plaintiffs, executor and executrix, are ready to verify, wherefore they pray judgment and their damages by reason of the non-performance of the said several promises and undertakings in the said [first, third, fourth, and fifth] counts in the said declaration in this suit mentioned, to be adjudged to them, &c.

Other rep-  
lications to  
Statute of  
Limita-  
tions.

*The other replications to the Statute of Limitations may be, that the debts or accounts were due between merchants, in which cases the statute does not affect the remedy, see the forms, 6 T. R. 193.—2 Saund. 124, 127, n. b.—8 Wils. 79; or the plaintiff's infancy, 2 Saund. 118.—Lutw. 143; or that he obtained a judgment which was arrested or reversed, and that he now sues within a year after such reversal, &c. 2 Saund. 68 h. (1). As to the replication in an action against husband and wife, see 1 B. & C. 248.—2 D. & R. 563, S. P.—Tidd, 9th ed. 1250. See the notes, 1 Chit. Col. Stat. 700 to 708.*

[\*1163]  
TO PLEAS  
BY EXECU-  
TORS.

That de-

[\*Precludi non, as ante, 1145, first form.]—Because he saith, that the said defendant at the time of the exhibiting of the said bill of the said plaintiff, [or, if in C. P. or by original, say, "at the time of the com-

(1) It has been decided in *Massachusetts*, that the st. 1798, c. 75, § 2, which enables a party whose action has failed through unavoidable accident, informality, &c. to commence a new action, which but for this statute would have been carried by the statute of limitations, does not apply to actions of slander, or other actions arising *ex delicto*. *Cook v. Darling*, 2 Pick. 605

commencement of this suit,"] was, and from thence hitherto hath been, and still is, executor of the last will and testament of the said E. F. deceased, and hath administered divers goods and chattels, which were of the said E. F. deceased, at the time of his death, as executor of the last will and testament of the said E. F. to wit, at, &c. (*venue*) aforesaid. And this the said plaintiff prays may be inquired of by the country, &c.

TO PLEAS  
BY EXECU-  
TORS.

Defendant is  
executor  
(k).

[*Precludi non, as ante, 1145, first form.*—Because he saith, that the said defendant, on the day of exhibiting the bill of the said plaintiff in his behalf, [or, *if in C. P. or by original, say*, "at the time of the commencement of this suit,"] had divers goods and chattels (1) which were of the said E. F. deceased, at the time of his death, in the hands of the said defendant, as executor [or, "administrator,"] as aforesaid, to be administered, of great value, to wit, of the value of the damages sustained (k) by him the said plaintiff, by reason of the premises in the said declaration mentioned, and wherewith the said defendant, as executor [or, "administrator,"] as aforesaid, could and might, and ought to have satisfied those damages. And this the said plaintiff prays may be inquired of by the country, &c.

To *plene*  
*adminis-*  
*travit*, that  
defendant  
had assets  
(i).

[*Same as the above to the end.*—And the said defendant doth the like, and inasmuch as the said defendants as executors as aforesaid, do not, doth either of them, in or by the aforesaid plea, deny the aforesaid allegation of the said plaintiff, nor but that the said — did undertake and promise in manner and form as the said plaintiff hath in his said declaration alleged and above declared against the said defendants, as executors as aforesaid, nor but that the said plaintiff ought to recover his damages occasioned by the non-performance of those promises and undertakings, the said plaintiff prays judgment, and his damages by him sustained on occasion of the not performing of the said promises and undertakings to be adjudged to him, to be levied of the goods and chattels which were of the said — deceased, at the time of his death. Therefore it is considered that the said plaintiff do recover his damages aforesaid, by him sustained, by reason of the premises to be so levied, but because it is not known what damages the said plaintiff hath sustained on occasion of the non-performance of the several promises and undertakings aforesaid; and because it is also unknown at present whether the said defendants or either of them will or will not be convicted of the premises above put in issue between the said plaintiff and the said defendants respectively, to be tried by the country, and because until the aforesaid issues are tried,

Replica-  
tion and  
award of  
*venire*,  
where only  
plea of  
*plene ad-*  
*ministravit*  
is pleaded.  
["1164"]

(1) See the plea, ante, 941, and the forms of replications, 1 Wentw. 201.—3 Id. 211, and 24.—East Ent. 322, b.—1 Rich. C. P. 455.

(i) As to this replication, see Com. Dig. Master, 2 D. 9.—See the forms, 2 Saund. 921.—3 Rich. C. P. 247.—1 Rich. C. P. 455. It is observable, that this replication does not deny the words in the plea, ante, 943, 4, within brackets; the reason is, that those words are superfluous, and not the material allegation to be traversed, see 2 Saund. 220, n. 3. The plaintiff will, at all events, if he proves the

debt, be entitled to take judgment of assets *quando acciderint*, though he should fail on the plea of *plene administravit*, 12 East, 282.—Ante, 943, n. If assets have come to the defendant's hands since the commencement of the suit, the fact should be replied specially, (6 T. R. 10.—3 Went. 224,) see the following forms. The conclusion to the country is sufficient, 1 Lutw. 101.

(k) The form of debt is precisely similar, substituting the words "*debt*" for "*damages sustained, &c.*"

(1) Vide the *People v. Dunlap*, 18 Johns. 440.

TO PLEAS  
BY EXECU-  
TORS.

final judgment herein cannot be given, therefore let the giving of judgment herein be stayed until the issues above joined are determined, and as well to try the said issue above joined, as to inquire what damages the said plaintiff has sustained by reason of the premises aforesaid, let a jury thereupon come [or, *by original*, "the sheriff is commanded that he come to come"] before our lord the king, at Westminster, on — next after — [or, *if by original*, "— (a general return day) wheresoever, &c. twelve, &c."] by whom, &c. and who neither, &c. to recognize, &c. because as well, &c. the same day is given to the parties aforesaid, at the same place [or, *by original*, "there, &c."]

Replica-  
tion to the  
plea of  
*plene ad-  
ministravit*  
by an exe-  
cutor of an  
executor,  
that the  
execu-  
tors did not  
fully ad-  
minister  
(1).

[\*1165]

[*Precludi non, as ante, 1145, first form.*]—Because he saith, that the said G. H. (*the first executor*), in his life-time, did not fully administer all and singular the goods and chattels which were of the said E. F. (*the first testator*), deceased, at the time of his death, and which came to the hands of him the said G. H. (*the first executor*), as such executor as aforesaid to be administered; nor hath the said defendant, executor as aforesaid, since the death of the said G. H. (*the first executor*), deceased, fully administered all and singular goods and chattels which were of the said E. F. (*the first testator*), deceased, at the time of his death, and which have come to the hands of him the said defendant, as executor as aforesaid, to be administered, but that he the said defendant, as executor as aforesaid, on the \*day of exhibiting of the bill of the said plaintiff in this behalf had in his hands divers goods and chattels which were of the said E. F. (*the first testator*), deceased, at the time of his death to be administered of great value, to wit, of the value of the damages sustained by the said plaintiff, by reason of the premises in the said declaration mentioned, and wherewith those damages could, might, and ought to have been satisfied to wit, at, &c. (*venue*) aforesaid. And this the said plaintiff prays may be inquired of by the country, &c.

The like to  
a plea of  
bonds or  
judgments  
outstand-  
ing.

[*Same as the form, ante, 1163, to the asterisk, and then proceed as follows:*]—Over and beyond the said goods and chattels in the said first plea admitted to be in the hands of the said defendant, to be administered, and more than sufficient to satisfy and pay the monies due and owing upon and by virtue of the said writings obligatory, and judgments in the said first plea mentioned, and wherewith, &c.—[*Conclude as in the form ante, 1163, from the asterisk.*]

That de-  
fendant  
had assets  
at the time  
he had no-  
tice of the  
writ.

*When the defendant pleads that he had no assets at the time of exhibiting the bill, and in point of fact he had assets at the time he had notice of the action, and before the plaintiff declared, unduly paid other debts of equal or inferior degree without a judgment having been obtained for them, (see Com. Dig. Administration, C. 2.—Dyer, 22 a.—1 P. Wms. 295.—3 P. Wms. 401.—1 T. R. 690.) the plaintiff may reply the issuing of the writ, and the service thereof on the defendant, and that he the had assets, see the forms, 3 Wentw. 214, 239; but as it appears from Dyer, 22 a. Com. Dig. Administration, C. 2, that under the general plea of plene administravit, the defendant is not at liberty to give in evidence any payment after notice of the plaintiff's action, this special replication may not be necessary.*

(1) See the plea, ante, 944.

[*Precludi non, as ante, 1145, first form.*—Because he saith, that he exhibited his bill in this suit against the said defendant as executor as aforesaid, heretofore, that is to say, upon, &c. and that after exhibiting the said bill, and \*before the time of pleading the said plea of the said defendant, to wit, on, &c. aforesaid, on divers other days and times between that day and the day of pleading the said plea, divers goods and chattels which were of the said E. F. at the time of his death, of great value, to wit, of the value of the said damages in the said declaration mentioned, came to, and were in the hands of the said defendant as executor as aforesaid, to be administered, to wit, at, &c. (*venue*) aforesaid, and wherewith he could and might, and ought to have satisfied the damages aforesaid. And this the said plaintiff is ready to verify, wherefore he prays judgment, and his damages aforesaid, to be levied of the said goods and chattels, which were of the said E. F. at the time of his death, which have so come to the hands of the said defendant as executor as aforesaid, to be administered, since the exhibiting of the bill aforesaid, &c.

TO PLEAS  
BY EXECU-  
TORS.

That after the exhibiting of the bill, and before the plea, assets came to defendant's hands (m).

[\*1166]

[*Precludi non, as ante, 1145, first form.*—Because he saith, that the said judgment in the said first plea mentioned to have been recovered against the said defendant by the said E. F. was had and obtained by the fraud and covin of the said defendant, and with the intent to defraud the said plaintiff of his debts. And the said plaintiff further saith, that the said judgment in the said first plea mentioned to have been recovered against the said defendant by the said G. H. was had and obtained by the fraud and covin of the said defendant, and with the intent to defraud the said plaintiff of his said debt. And this, &c.—[*Conclude with a verification, as ante, 1145.*]

To plea of judgments recovered against executor, that they were obtained by fraud (n).

[*Precludi non, as ante, 1145, first form.*—Because he saith, that the said E. F. in his life-time, and at the time of his death, was indebted to the said G. H. in a much less sum of money than the said sum of £—, to wit, in the sum of £— only, and no more, to wit, at, &c. (*venue*) aforesaid, and that the said defendant permitted and suffered the said judgment in the said plea mentioned, to pass against him the said defendant for much more, to wit, the sum of £— more than was due and owing from the said E. F. in his lifetime, and at the time of his death, to the said G. H. by the fraud and covin of the said defendant, and the said G. H. in order to cover and protect the goods and chattels which were of the said E. F. at the time of his death, which had or might come to the hands of the said defendant, to be administered from the payment and discharge of the damages sustained by the said plaintiff by reason of the non-performance of the said several promises and undertakings

[\*1167]

To a plea of judgment recovered against executor, that he fraudulently suffered the judgment to be obtained against him for more than was due. (o).

(m) This would be replied, 6 T. R. 10. See other form, 3 Wentw. 224, 245, and the notes therein given, and the observations of Burst, J. 6 T. R. 10, 11.—1 Saund. 386 a.—*Id.* 216, n. 1; 219, n. 2; and see the form the judgment, 1 Saund. 386 a.

(n) See the forms, 1 Lutw. 680.—2 Saund. —Plead. Assist. 873.—Lil. Ent. 159. As to replication in general, see Com. Dig. under, 2 D. 9.—5 T. R. 30. It is sufficient to allege generally, that the judgment was obtained or continued by covin, without showing

the special matter, and that it was by the covin of the executor or administrator only, 9 Rep. 110. If several judgments be pleaded, the plaintiff may, in his replication, answer one only, or every judgment separately, 2 Saund. 48, 49.—1 Saund. 334, 336, 337 b. n. 2.

(o) See the note to the above form, and Lil. Ent. 159. When anything was due at the time the judgment was obtained, but it was confessed fraudulently for too large a sum, this replication is proper, 5 T. R. 8, 2.

TO PLEAS  
BY EXECU-  
TORS.

in the said declaration mentioned, and to prevent the said plaintiff from recovering his damages aforesaid. And the said plaintiff further saith, that the said defendant now hath, and at the time of the commencement of this suit had, divers goods and chattels, which were of the said E. F. deceased, at the time of his death, in his hands to be administered, sufficient to satisfy all the money really due and owing from the said E. F. at the time of his death, to the said G. H. and the damages aforesaid, by the judgment aforesaid, in form aforesaid recovered, and also the damages sustained by the said plaintiff by reason of the non-performance of the said several promises and undertakings in the said declaration mentioned, to wit, at, &c. (*venue*) aforesaid. And this, &c.—[*Conclude with a verification, (p), as ante, 1145.*]

To plea of  
bond out-  
standing,  
that it has  
been paid,  
and is  
fraudulent  
ly kept on  
foot (q).

[\*1168]

[*Precludi non, as ante, 1145, first form.*—Because he saith, that after the making of the said writing obligatory in the said plea mentioned, and before the pleading of the said plea, to wit, on, &c. the said writing obligatory to the said G. H. and all money thereon due and payable was fully paid off, discharged, and satisfied, to him the said G. H. to wit, at, &c. (*venue*) aforesaid. And the said plaintiff in fact further saith, that notwithstanding such payment and discharge of the said writing obligatory to the said G. H. as aforesaid, the said writing obligatory is still kept on foot uncanceled, by the fraud and covin of the said defendant, with intent to defraud the said plaintiff of the damages by him sustained on occasion of the premises in the said declaration mentioned. And this, &c.—[*Conclude with a verification, as ante, 1145.*]

Replica-  
tion to  
plea of re-  
tainer on  
an inden-  
ture, that  
the same  
was void,  
for fraud.

[*Precludi non, as ante, 1145.*—Because he saith, that the said supposed indenture was made and entered into and executed by the said E. F. deceased, for the purpose and with the intent of the said E. F. and others in collusion with him, to defraud the said plaintiff and others, the creditors of the said E. F. of their just and lawful debts and claims against the said E. F. and therefore the same was and is void in law. And this, &c.—[*Conclude with a verification, as ante, 1145.*]

Similitur  
to general  
to plea of  
issue, and  
plene ad-  
ministravit  
prayer of  
judgment  
of assets  
(quando ac-  
ciderint) (r)

[*If the defendant have pleaded the general issue, as well as plene administravit, and the plaintiff is not certain of being able to prove that the defendant has received assets, he should not take issue on the latter plea, but should reply as follows, upon which the defendant usually withdraws the general issue, or will have to pay the costs of the trial, in case the plaintiff obtains the verdict; see ante, 944.*—And the said plaintiff, as to the said plea of the said defendant, by him first above pleaded, and whereof he hath put himself upon the country, doth the like. And as to the said plea of the said defendant, by him lastly above pleaded, the said plaintiff, inasmuch as he cannot deny the said several allegations of the said defendant, in his said last plea, prays judgment, and his damages by him sustained, on occasion of the not performing of the said several promises and undertakings in the said declaration men-

(p) *Quere* as to this conclusion, see 1 Saund. 103, n. 3. forms referred to, id. 834, note 9

(q) See the form, 3 Wentw. 243, 244, and other especial forms, Lil. Ent. 58.—Bro. Rep. 56.—1 Saund. 388 to 386, and the law and the

(r) As to this replication, see Com. Dig. Pleading, 2 D. 9.—No interest is recoverable on this judgment, see 3 Ves. 185.



tioned, to be adjudged to him to be levied of the goods and chattels which were of the said G. H. at the time of his death, and which, since the pleading of the said second plea of the said defendant, have come (s) or which shall hereafter come, to the hands of the said defendant, as executor, (or, "administrator,") as aforesaid to be administered (or, if the plea were of bonds, &c. outstanding, and plene administravit "præter, here add the following words, "after satisfying the monies due and owing on the said several judgments and writings obligatory in the said last plea mentioned.")—But because it is uncertain whether the said defendant will be convicted upon the said issue above joined between the parties aforesaid, therefore let judgment be thereupon stayed until the trial and determination of the said issue, and in order to try the said issue let a jury come, &c.—[Award of venire by bill or original, as ante, 1156.]

TO PLEAS  
BY EXCEU-  
TORS.

[\*1169]

And hereupon the said plaintiff, inasmuch as the said defendant hath not denied the said action of him the said plaintiff nor but that the said E. F. in his lifetime did undertake and promise in manner and form as the said plaintiff hath above in that behalf alleged, and inasmuch as the said plaintiff cannot deny but that the said defendant had not any goods or chattels which were of the said E. F. at the time of his death, in his hands to be administered, in manner and form as the said defendant hath above in his said plea in that behalf alleged, prays judgment, and his damages by him sustained, on occasion of the not performing of the said several promises and undertakings in the said declaration mentioned, to be adjudged to him, to be levied of the goods and chattels which were of the said E. F. at the time of his death, and which, since the pleading of the said second plea of the said defendant, have come, or which shall hereafter come to the hands of the said defendant to be administered, (or, if the plea were of bonds, &c. outstanding, and plene administravit præter, here add the following words, "after satisfying the monies due and owing on the said several judgments and writings obligatory in the said last plea mentioned.") Therefore it is considered that the said plaintiff ought to recover against the said defendant his damages by him sustained on occasion of the premises, to be levied in form aforesaid, but because it is unknown to the court of our said lord the king, now here, what damages the said plaintiff hath sustained by means of the premises, the sheriff is commanded, that, by the oath of twelve good and lawful men of his bailiwick, he diligently inquire what damages the said plaintiff hath sustained by means of the premises, and that he send the inquisition which he shall thereupon take to our said lord the king at Westminster, on — next after — under his seal and the seals of those by whose oath he shall take that inquisition, together with the writ of our said lord the king, to him thereupon directed, the same day is given to the said plaintiff, and to the said defendant, at the same place.

The like with award of inquiry, where the general issue was not pleaded.

The judgment.

Replication to a plea of plene administravit præter praying judgment as to the 10l., and averring assets extra, sufficient to pay the debt.

See a form, 3 Wils. 52.

## \*REPLICATIONS IN DEBT.

Common  
conclusion  
with a ver-  
ification.

[*The common similiter in debt, to a plea concluding to the country, is the same as in the form in assumpsit, ante, 1144. When the replication concludes with a verification otherwise than of matter of record, the form is as follows:*—And this he the said plaintiff is ready to verify, wherefore he prays judgment and his debt aforesaid, together with his damages by him sustained, on occasion of the detention thereof, to be adjudged to him, &c..

FOR  
ESCAPES.

Replica-  
tion to  
plea in ac-  
tion for es-  
cape, simi-  
lar to that  
ante, 958,  
&c. that  
defendant,  
of his own  
wrong, volun-  
tarily per-  
mitted prison-  
er to es-  
cape, and  
traverse  
the prison-  
er's forcible  
escape  
against de-  
fendant's  
will.

[\*1171]

Traverse  
of the for-  
cible es-  
cape.  
Replica-  
tion to  
plea in ac-  
tion for es-  
cape, after  
such es-  
cape, that  
after such  
escape and  
return, the  
prisoner  
again es-  
caped, for  
which  
plaintiff  
sues (b).

[*Precludi non, as ante, 1145.*—Because he says, that after the commitment of the said E. F. to the custody of the said defendant, in execution as aforesaid, that is to say, on the — day of — in the — year of the reign of our said lord the king, (the said defendant then and still being marshal of the Marshalsea of our sovereign lord the king before the king himself, as aforesaid,) at, &c. (*venue*) aforesaid, he the said defendant, of his own wrong (a) permitted and suffered the said E. F. to go at large whither he would, and to escape out of the custody of the said defendant, in manner and form as the said plaintiff hath above complained against him; without this, that the said E. F. forcibly and without the knowledge, consent, or permission of the said defendant, and against his will, escaped from and out of the custody of him the said defendant, as such marshal as aforesaid, in manner and form as the said defendant hath in his said plea by him secondly above pleaded in bar alleged. And this, &c.—[*Conclude with a verification, as in the preceding form.*]

[*Replication to first plea, similiter; to second plea, the plaintiff admitting that the escape was without the privity of the defendant, and that the return to prison was voluntary, alleges:*] “that the said E. F. had not from thenceforth been kept and detained in the custody of the said defendant, but that after he the said E. F. had so returned into custody, and after the said defendant had notice of the former escape, and before the exhibiting the said bill in this behalf, the said defendant permitted and suffered the said E. F. to escape and go at large, in manner and form as the said plaintiff hath above complained against him the said defendant (c), which said last-mentioned escape is another and different escape than the escape mentioned in the plea of the said defendant, so by him lastly above pleaded in bar as aforesaid, and was and is the very same identical escape for which the said plaintiff brought this action and exhibited his aforesaid bill. And this, &c.—[*Conclude with a verification, as ante, 1170.*]

(a) *Quare*, if it should not be alleged that the defendant “voluntarily, permitted,” &c.

(b) See 1 B. & P. 414.

(c) What follows in this plea is not, perhaps, strictly necessary. The replication might shortly traverse the allegation in defendant's plea, that since the escape he had

kept the prisoner safely, 1 B. & P. 417. To the evidence requisite on the part of plaintiff, and that he must, on a traverse on the above allegation, prove the prior or first escape, see 1 B. & P. 418, n. a, and *id.* Index “Evidence,” pl. 10.

[*Precludi non, as ante, 1145.*—Because he saith, that the said now defendant did not, before the exhibiting of the said bill against the said now defendant in this behalf, retake the said E. F. upon the said pursuit, or again have or detain him the said E. F. in the custody of the said now defendant in execution, at the suit of the said plaintiff for the damages, costs and charges, so by him recovered as aforesaid, by virtue of the said commitment of the said E. F. in execution as aforesaid, in manner and form as the said defendant hath above in his said plea in that behalf alleged. And this the said plaintiff prays may be inquired of by the country, &c.

FOR ESCAPES  
Replication to a plea of voluntary escape and recaption, in an action against the marshal, that the bill was filed before prisoner's recaption. Replication in an action against the warden, to a plea of a voluntary return, that the bill was filed before the return.

[*Precludi non, as ante, 1145.*—Because he saith, that the said E. F. did not, after the said escape in the said first count mentioned, and before the commencement of this suit, return back again into the custody of the said defendant, nor did the said defendant, at the time of the commencement of this suit, keep or detain the said E. F. in his custody as such warden as aforesaid, in execution at the suit of the said plaintiff, under and by virtue of the said commitment and receipt in execution as aforesaid, but on the contrary thereof the said E. F. at the time of the commencement of this suit continued so escaped and at large out of the custody of the said defendant as such warden as aforesaid. And this the said plaintiff prays may be inquired of by the country, &c.

[*Precludi non, as ante, 1145, first form.*—Because he saith, that the said writing obligatory in the said declaration mentioned, was obtained fairly and honestly by the said plaintiff (e), and not by the said plaintiff and others in collusion with him, by fraud, covin, or misrepresentation, in manner and form as the said defendant hath in his said plea by him [lastly] above pleaded alleged. And this the said plaintiff prays may be inquired of by the country, &c.

FRAUD.  
To plea that deed was obtained by fraud, that it was duly obtained (d).

[*\*Precludi non, as ante, 1145, first form.*—Because he saith, that the said defendant of his own free will made and sealed, and as his act and deed delivered to the said plaintiff the said writing obligatory in the said declaration mentioned (g), and not by reason or in consequence of the said supposed menaces or threats in the said [second] plea mentioned, or in fear or apprehension thereof in manner and form as the said defendant hath in his said [second] plea in that behalf alleged. And this the said plaintiff prays may be inquired of by the country, &c.

[\*1172]  
DURESS.  
To plea that deed was obtained by menaces, that defendant freely executed it (f).

[*Precludi non, as ante, 1145, first form.*—Because he saith, that the said defendant at the time of the making of the said writing obligatory in the said declaration mentioned, was of the full age of twenty-one years and not within age, in manner and form as the said defendant hath above

INFANCY.  
To plea of infancy, that defendant was of age (h).

(d) See the plea, ante, 963; see a rejoinder that a deed was duly obtained, 2 Rich. C. P. 78, and replications to that effect, Morg. 585.

Dig. Pleader, 2 W. 19, 20. See replication to plea of duress of imprisonment, 2 Rich. C. P. 78.—Morg. 585, 587.

(e) It would suffice merely to deny the words of the plea.

(g) It would seem sufficient merely to deny the words in the plea.

(f) See pleas of menace, &c. ante, 964. See replications to the other pleas, ante, 964, and nearly resemble the above form; see the forms in 7 Wentw 337, 590 to 596, and Com.

(h) See the plea, ante, 965. and the forms, Rast. Ent. 163 a.—7 Wentw. 577, 578—Com. Dig. Pleader, 2 W. 22, and the replication in assumpsit, ante, 1140.

in his said plea alleged. And this the said plaintiff prays may be inquired of by the country, &c.

USURY, &c.

To a plea of usury, or other illegality, that the bond was given upon a legal contract (i).

[*Precludi non, as ante, 1145, first form.*—Because he saith, that the said writing obligatory in the said declaration mentioned, was made by the said defendant for a good and legal consideration, and not in pursuance of or upon the said corrupt and unlawful agreement, or for the purpose in the said plea of the said defendant mentioned, in manner and form as the said defendant hath above in his said [second] plea in that behalf alleged. And this the said defendant prays may be inquired of by the country, &c

TENDER.

To a plea of tender (k).

[\*1173]

[*Similiter to general issue, as ante, 1144; replication to plea of tender, as follows:*—And the said plaintiff, as to the said plea of the said defendant by him above pleaded, as to the said sum of £—, residue of the said sum of £— above demanded, saith that he the said plaintiff ought not, by reason of any thing by the said defendant in that plea alleged, to be barred from having and maintaining his aforesaid action against the said defendant to recover damages by reason of the non-payment of the said sum of £— because he saith, that, &c.—[*Here state the subject-matter of the replication, as in the forms in assumpsit, as ante, 1151 to 1157, using the words, “after the said several causes of action in the said declaration mentioned, and each and every of them, accrued to the said plaintiff as to the said sum of £—,” instead of the words “after the making of the said promises and undertakings in the said declaration mentioned,” and then conclude as follows:*] And this he the said plaintiff is ready to verify, wherefore he prays judgment, and his damages by reason of the non-payment of the said sum of £— to be adjudged to him, &c. [*but if the replication merely deny the tender, then conclude to the country.*]

SET-OFF.

Replication to a plea of set-off to debt on bond, denying the set-off (l).

[*Precludi non, as ante, 1145.*—Because protesting that at the time of exhibiting the said bill there was and still is a much larger sum of money than the said sum of £575 due and owing for principal money and interest, upon and by virtue of the said writing obligatory, and the said condition thereof, to wit, the said sum of £— to wit, at, &c. (*venue*), aforesaid, for replication in this behalf he says, that he the said plaintiff was not nor is indebted to the said defendant in manner and form as the said defendant hath above in his said plea alleged. And this the said plaintiff prays may be inquired of by the country, &c.

Replication to plea of set-off to

[*Precludi non, as ante, 1145.*—Because protesting that at the time of exhibiting the said bill there was and still is a much larger sum of

(i) See the plea, ante, 966, and the form, 2 Rich. C. P. 37.—Morg. Prec. 229, 230.—1 Bro. Ent. 188.—2 T. R. 439.—3 Id. 426.—7 Wentw. Index, 628, 329, 639.—Com. Dig. Pleader, 2 W. 23. Some of the forms conclude with a formal traverse and verification, Lil. Ent. 184.—Morg. 231, but see 2 T. R. 439, and 1 Saund. 103 b, n. 8.

(k) See the plea, ante, 955, and the forms, 7 Wentw. 577, 580, 589, 584.

(l) See form, 2 Rich. C. P. 31. The replication to a plea of set-off to debt on simple

contract, when it concludes to the country, is precisely similar to that in assumpsit, ante, 1158, &c. Where the set-off is to debt on bond, the replication may either deny the subject-matter of the defendant's set-off, or allege that more was due on defendant's bond, than the sum mentioned in the plea, see 3 T. R. 65.—6 Id. 460.—Ante, 968. If the replication conclude with a verification, such conclusion will be as ante, 1170. As to the replication to a plea of set-off in general, see ante, vol. 1 Index, “Set-off.”

money, than the said sum of £— due and owing for principal money and interest, upon and by virtue of the said writing obligatory, and the said condition thereof, to wit, the sum of £— to wit, at, &c. (*venue*) aforesaid, nevertheless for replication in this behalf, the said plaintiff saith, that the said plaintiff was not, nor is indebted to the said defendant in manner and form as the said defendant hath above in his said plea alleged. And this the plaintiff prays may be inquired of by the country, &c.

SET-OFF.

debt on bond protesting that more is due to plaintiff on the bond than (m).

the sum admitted in defendant's plea, states that plaintiff is not indebted to defendant

And because the said plaintiff doth not deny the said plea of the said defendant, but admits the same to be true, thereof let the plea of the said plaintiff, and all the proceedings thereon, be stayed until the full age of the said defendant, &c.

[\*1174]

BY AND AGAINST HEIRS, &c.

To parol demurrer, confession of plea (n) To plea of *rien per descent*, that defendant had assets at the time of commencement of the suit (o).

[*Precludi non, as ante, 1145, first form.*]—Because he saith, that the said defendant hath, and at the time of the exhibiting of the said bill of the said plaintiff [or, *if in C. P.* or, *by original*, "at the commencement of this suit,"] had sufficient lands, tenements and hereditaments by descent from his said father, [*"or brother," &c. according to the fact,*] in fee simple, wherewith the said defendant could and might and ought to have satisfied the said debt of the said plaintiff above demanded. And this the said plaintiff prays may be enquired of by the country, &c.

[*Precludi non, as ante, 1145, first form.*]—Because, according to the form of the Statute in such case made and provided, he saith, that the said defendant after the death of the said E. F. his father, and before the day of exhibiting "the said plaintiff's bill in this behalf, [or, *if in C. P.* or, *by original*, say, "before the commencement of this suit,"] to wit, on, at, &c. (*venue*) aforesaid, had divers lands and tenements by hereditary descent as heir to the said E. F. in fee simple, whereby he might have satisfied the said plaintiff the debt and damages aforesaid. And this, &c. (q).

To plea of *rien per descent*, that defendant had assets before the commencement of the suit (p).

[*Conclude with a verification, as ante, 1170.*] (1).

[\*1175]

[*Precludi non, as ante, 1145, first form.*]—Because he saith, that the said defendant did not pay to the said plaintiff the said sum of £— in the said

PAYMENT.

To plea of *solvit ad diem*, or *post diem*, denying the payments (r).

(m) See 2 Rich. C. P. 81. When it is apprehended that the plaintiff is not indebted to defendant in a sum equal to that admitted in the plea to be due on the bond, the replication is preferable.

(n) See the plea, ante, 978; and Rast. Ent. 360, 362.

(o) See the plea, ante, 978, and forms of replication, 1 Rich. C. P. 451.—2 Rich. C. P. Morg. 665.—2 Mod. 227, 8.—7 Wentw. 4, 5. And see several forms of replication and rejoinders, Morg. 654 to 660. If the defendant had not assets at the time of exhibiting the bill, but had them at the time the writ was issued, the issuing of the writ should be recalled specially, as ante, 1161, and under the 4th W. & M. C. 14, if the heir plead *rien per descent*, the plaintiff may reply that he has assets between the death of his ancestor,

and before the commencement of this suit as in the next form, see Bac. A. B. Heir and Ancestor, F.

(p) See forms, 5 Wentw. 878.—1 Rich. C. P. 451.—2 Id. 296, and the note to the preceding form, 5 Mod. 122, 8.

(q) This seems necessary, see 2 Saund. 8 a.—Carth. 358, 4.

(r) See the plea, ante, 978. See form of replication, Plead. Assist. 860. To annuity bond, see form, 2 New Rep. 362. To bond for payment of mortgage, 5 Moore 198. In the latter case to debt on bond the defendant craved oyer, and after reciting a mortgage deed, which showed the condition to be for payment of a sum of money on a day specified, according to the tenor of a proviso contained in the indenture, and for the performance of the covenants therein, pleaded that there was no negative or

(1) As to this conclusion, vide Labach et al. v. Cantine et al. 13 Johns. 272.

condition mentioned, with lawful interest for the same, in manner and form as the said defendant hath above in his said plea in that behalf alleged. And this the said plaintiff prays may be enquired of by the country, &c.

[\*1176] *ON AWARDS.* [\**Precludi non, as ante, 1145, first form.*]—Because he saith, that the said E. F. and G. H. the said arbitrators in the said condition of the said writing obligatory mentioned, after the making of the said writing obligatory and within the time limited and appointed by the said condition for the making of their award of and concerning the premises, that is to say, on, &c. at, &c. (*venue*) aforesaid, having taken upon themselves the burthen of the said arbitrament, did in due manner make their award in writing under their hands, of and concerning the premises in the said condition mentioned, and thereby referred to them by the said plaintiff and defendant ready to be delivered to the said parties in difference, or such of them as should require the same, by which said award they the said E. F. and G. H. the arbitrators aforesaid, did then and there award and order, &c. [*Here set forth the whole award verbatim, in the past tense*] (*t*).—Of which said award the said defendant afterwards, to wit, on the said, &c. at, &c. (*venue*) aforesaid, had notice. Nevertheless the said plaintiff in fact saith, that the said defendant did not, &c. [*Here state the defendant's breach of the award, according to the facts of the particular case, and which may be as in the declaration, ante, 395, and if there have been several breaches of the award, state the second or other breach as follows :*—And for assigning a further breach of the said award, according to the form of the Statute in that case made and provided (*w*), the said plaintiff in fact further saith, that, &c. [*Here state the other breach, and conclude as follows :*—And this the said plaintiff is ready to verify ; wherefore he prays judgment and his debt aforesaid, together with his damages by reason of the detention thereof, to be adjudged to him, &c.

Breaches  
of the  
award  
(*s*).

[\*1177] *ON BAIL BONDS.* To plea of ease and favor to debt on bail bond that bond was duly executed (*x*). [\**Precludi non, as ante, 1145, first form.*]—Because he saith, that the said defendant, as bail or surety for the said E. F. before the return of the said writ in the said declaration mentioned, and on the day of the date of the said writing obligatory, to wit, on, &c. at, &c. (*venue*) aforesaid, sealed, and as his act and deed delivered the said writing obligatory in the said declaration mentioned, and in manner and form as the said plaintiff

disjunctive covenants in the indenture, and that he paid the money mentioned in the condition on the day therein specified, according to the effect thereof, and performed all the covenants and provisions in the indenture on his part to be performed. The defendant in his replication took issue generally on the non-payment of the money, and concluded to the country. On special demurrer, assigning for causes that it should have concluded with a verification, and that no breach of the condition was assigned according to the stat. 8 & 9 Wm. 3 c. 11, s. 8, it was held that such replication was good, as the only point at issue was the payment of the money, and the plaintiff had therein denied the whole substance of the defendant's plea.

(*s*) See the plea, ante, 977, and the forms of replication of an award and breach, 1 Saund. 165, 166—2 Id. 181, 185.—2 Wils. 267.—2 Rich. C. P. 44.—Morg. Prec. 527—7

Wentw. 527 to 530, and of an umpirage, 1 Saund. 68.

(*t*) The whole award must be stated, 11 East, 188.—1 Salk. 72, 8.—2 Saund. 62 b, n. 5.

(*u*) A breach must be stated, though the defendant pleaded no award, and could not traverse the breach, this is an anomalous case, 1 Saund. 108, n. 1; 817, n. 4.—1 Marsh. 95.—6 Taunt. 45, 47.—5 Taunt. 386.—See form, 2 Rich. C. P. 46.—Morg. 528. The breach may frequently be assigned in the terms of the award, 1 Price, 109 ; But see 6 Taunt. 45, 47.

(*w*) See the preceding note.

(*x*) See the plea, ante, 981, and the replication and note, 5 Wentw. 468; and see the forms, 1 Saund. 159, 18.—6 Wentw. 613, 14, Com. Dig. Pleader, 2 W. 25. The ease and favor is in general the most material traverse, 1 Saund. 163, n. 2. Most of the forms conclude with a formal traverse.

hath in his said declaration alleged, and not after the return of the said [writ] in the said declaration mentioned, in manner and form as the said defendant hath above in his said plea alleged. And this the said plaintiff prays may be enquired of by the country, &c.

ON BAIL  
BONDS.

[*Precludi non, as ante, 1145, first form.*].—Because he saith, that there is no record of the said appearance of the said E. F. before our lord the king [or in C. P. “before his majesty’s justices,”] at Westminster, on —, in the said condition of the said writing obligatory mentioned, remaining in the said court of our said lord the king, before the king himself, [or in C. P. “before his said majesty’s justices,”] at Westminster in manner and form as the said defendant hath above in his said — plea alleged. And this the said plaintiff is ready to verify, &c.—[*Conclude as in form, ante, 1157, from the asterisk.*]

To plea of  
*comperuit  
ad diem*,  
denying  
the record  
of appear-  
ance (y).

[*Precludi non, as ante, 1145, first form.*].—Because he saith, that the said E. F. in the said condition mentioned, at the time of making the said writing obligatory was pregnant with a certain child, whereof the said defendant was the reputed father, and the said E. F. after the making of the said writing obligatory, and before the commencement of this suit, to wit, on, &c. at, &c. (*venue*) aforesaid, was delivered of the said child, who was then and there born a bastard, in the said parish of —, and that neither the said defendant, nor any person on his behalf, for a long space of time after the birth of the said child, to wit, from the time of the said birth of the said child, until the commencement of this suit, did provide any food or nourishment “for the said child; by reason whereof the inhabitants and parishioners of the said parish of —, during the time aforesaid, lest the said child should perish for want of necessary food and nurture, were forced and obliged to expend, and did necessarily expend, a large sum of money, to wit, the sum of £—, lawful money of Great Britain, for, in, and about the procuring necessary food and nourishment for the said child, to wit, at, &c. (*venue*) aforesaid; and so the said plaintiff saith, that the said inhabitants and parishioners of the said parish of —, were and are damned by reason and on account of the maintenance and bringing up the said child, within the true intent and meaning of the said condition of the said writing obligatory, to wit, at, &c. (*venue*) aforesaid. —[*Conclude with a verification, as ante, 1170.*]

ON BASTARDY  
BONDS.  
To plea of  
*non dam-  
nificatus*  
to debt on  
bastardy  
bond, stat-  
ing that  
the parish-  
ioners  
were dam-  
nified (z).  
[“1178”]

[*Precludi non, as ante, 1175, first form.*].—Because he saith, that the said defendant did not nor would well and truly pay, or cause to be paid,

ON INDEMNITY  
BONDS

If the defendant in an action by the assumpsit of the bond, denies the issuing of the writ, the plaintiff should reply it was issued, as stated in the declaration, and aver the existence of the writ by the record, see 21, 9th ed. 748. In such case if the action is at the suit of the sheriff, the writ should be set out fully, and plaintiff should also aver its existence, &c. by the record.

(y) See a form, *Lil. Ent.* 498.

(z) See the plea, and notes, ante, 988 and the forms of replications, 2 *Saund.* 82.—7 *Eastw.* 615, 616; and the assignment of breaches, ante, 984. If only one breach be

assigned, it is not necessary to state it in terms to be according to the form of the statute (8 & 9 W. 3, c. 11, s. 8.) 11 *East*, 1; neither would it be if more than one, *quare* vol. i. Index, “*Breaches.*” The plaintiff cannot suggest and assign a breach in the same replication, ante, vol. i. Index, “*Breaches.*”

(a) See last note, and the plea, ante, 984, and the forms, 1 *Saund.* 115.—7 *Wentw.* 616 to 621; and on a sheriff’s bond, 1 *East*, 385. The above was the replication in *Holmes v. Rhodes*, 1 B. & P. 681; and was specially demurred to, because it did not state in what court the plaintiff was sued, and what sums

To plea of  
*non damni-  
ficatus* to  
debt on  
bond to in-  
demnify  
plaintiff  
against a  
surety  
bond, sta-  
ting how  
plaintiff  
was dam-  
nified (a).

ON INDEMNITY  
BONDS.

unto the said E. F. his executors, administrators, or assigns, the said sum of £—, and the interest thereof on the days and times, and in the manner limited and appointed in and by the said condition of the said writing obligatory so made and executed to the said E. F. as aforesaid, and according to the true intent and meaning thereof, but wholly neglected and refused so to do, to wit, &c. (*venue*) aforesaid; whereupon and whereby the said plaintiff, afterwards, to wit, on, &c. at, &c. (*venue*) aforesaid, was called upon, and forced and obliged to pay, and did then and there pay, to the said E. F. the said sum of £—, and the interest thereof, together with the costs of a certain action before then brought by the said E. F. against him the said plaintiff for the recovery thereof, amounting in the whole to a large sum of money, to wit, the sum of £—, of lawful money of Great Britain, and thereby he the said plaintiff was and is damnified to the amount thereof, by reason and means of the said in part recited obligation and the condition thereof, to wit, at, &c. (*venue*) aforesaid. And this, &c.—  
[\*1179] [Conclude with a verification, as ante, 1170.]

To plea of performance to debt on bond conditioned for E. F.'s duly accounting as a clerk, that E. F. received monies which he has not accounted for (b).

[*Precludi non*, as ante, 1145, first form.]—Because he saith, that the said E. F. remained and continued in the service and employ of the said plaintiff as such clerk, as in the said condition of the said writing obligatory mentioned, for a long space of time, to wit, from the day and year aforesaid, until and upon the — day of —, A. D. — (c); and that during the said time that the said E. F. so remained and continued in the said service and employment of the said plaintiff as such clerk as aforesaid, to wit, on, &c. and on divers other days and times, [between that day and the said — day of —, A. D. — to wit, at, &c. (*venue*) aforesaid, the said E. F. as such clerk as aforesaid, had and received, for and on the account of the said plaintiff divers sums of money, amounting in the whole to a large sum of money, to wit, the sum of £—, of lawful money of Great Britain (d), yet the said G. H. although often requested so to do, hath not yet accounted for or paid the same or any part thereof to the said plaintiff, but hath therein wholly failed and made default; and the said sum of money so had and received by the said E. F. as aforesaid, is still wholly unpaid and unsatisfied to the said plaintiff, contrary to the  
[\*1180] \*form and effect of the said condition of the said writing obligatory, to wit, at, &c. aforesaid. And this, &c.—[Conclude with a verification, (e), as ante, 1170.]

he was obliged to pay for interests and costs distinctly, but the plaintiff had judgment on a defect in the plea. As to this objection, see 1 Saund. 117, n. 5.—1 Lev. 195. 2 Wils. 11, 12; and note d, post, 1179.

(b) The averments in pleas of this nature must depend on the nature of the indemnity bond, see the pleas of performance, ante, 985 to 989, and the forms of replications and the law, 8 T. R. 459, 460.—1 B. & P. 640, 641.—2 New Rep. 176, 177.—8 East, 485.—6 Id. 507.—1 Saund. 101.—2 Id. 410.—3 Wils. 385.—7 Wentw. 537, 605, 616.—1 Marsh. 95.—5 Taunt. 386.—6 Id. 47.—2 Chit. Rep. 697.—5 Moore, 198.—13 East, 1. The case in 1 Price 109, seems overruled by that in 1 Marsh. 441. 6 Taunt. 45.—Ante, vol. i. Ind. "Indemnity." Special statements of breaches, 1 Saund. 55,

6, 816. On sheriff's bond, Cowp. 575.—1 East, 385. When liability ceases, 2 Taunt. 175.—4 Ip. 598, 678. The replication must not merely deny the general performance, as stated in the plea, but must assign and not suggest a breach or breaches, 1 Marsh. 95.—5 Taunt. 386.—Willes, 12.—Cowp. 575.—2 Saund. 187 b, 5th edit.—See the note in page 440, ante.

(c) Unless it appear from the condition of the bond that E. F. has already accepted the office, an acceptance thereof should be stated.

(d) A receipt of money must be shown, 6 Taunt. 47.—1 Marsh. 441, overruling 1 Price, 109.

(e) This is proper, see 2 Burr. 774.—1 Saund. 101, 2.



[Same as in the above form to the end of the verification, and then state the second breach, as follows :]—And for assigning a further breach of the said condition of the said writing obligatory, according to the form of the Statute in that case made and provided (g), the said plaintiff saith, that after the making of the said writing obligatory, and whilst the said E. F. remained and continued in the said service and employ of the said plaintiff as such clerk as aforesaid, to wit, on, &c. at, &c. (venue) aforesaid.—[State the breach according to the fact, and conclude with a verification, as in the preceding form.]

ON IN-  
DEMNITY  
BONDS,  
The like  
stating  
several  
breaches  
(f).

[And the said plaintiff, as to the said plea of the said defendants, by them [secondly] above pleaded in har, says, [*Precludi non, as ante*, 1145.]—Because he says, that the said defendants, within the space of sixty-five running days, and ten days after the expiration of the said sixty-five running days, from the arrival of the said ship at the port of S. did not offer and tender to the said plaintiff goods and merchandizes to load on board the said ship, on her homeward voyage from the said port of S. for her return to the port of London, and to despatch the said ship with the same from the said port of S. for her return to the port of London, in manner and form as the said defendant hath above in his said [second] plea alleged. And this the said plaintiff prays may be inquired of by the country, &c. And the said plaintiff, as to the said plea of the said defendants, by them [lastly] above pleaded, says, [*Precludi non, as ante*, 1145;] because he says, that the said plaintiff did not, within the space of sixty-five running days, and ten days after the expiration of the said sixty-five running days, from the arrival of the said ship at the port of S. with the said ship, quit the said port of S. in manner and form as the said defendant hath above in his [last] plea alleged. And this the said plaintiff prays may be inquired of by the country, &c.

ON CHARTER PARTIES.  
Replication to plea to action on charter-party, that defendant did not offer a cargo

Replication that the ship sailed before the expiration of the time.

[*Precludi non, as ante*, 1145, first form.]—Because he saith, that the said plaintiff did not, before the said rent became due, eject, expel, put out, or remove the said defendant from the possession of the said demised premises, or any part thereof, in manner and form as the said defendant hath above in his said plea in that behalf alleged. \*And this the said plaintiff prays may be inquired of by the country, &c.

ON LEASES.  
Denial of the eviction (h).

[*Precludi non, as ante*, 1145, first form.]—Because he saith, that he the said plaintiff did not accept or receive of and from the said G. H. the said rent in the said plea mentioned, or any part thereof, or accept the said G. H. as his tenant of the said demised premises with the appurtenances, in manner and form as the said defendant hath in his said plea in that behalf alleged. And this the said plaintiff prays may be inquired of by the country, &c.

To a plea by lessee, that plaintiff accepted an assignee as tenant, traverse of the acceptance (i).

[*Precludi non, as ante*, 1145, first form.]—Because he saith, that there is such a record of the said recognizance, [or, if a judgment, say, "re-

To a plea of nul tiens record in

(f) This replication is given by the Statute 19 W. c. 11, s. 8.—See 2 Saund. 58, n. 1.—2 Saund. 187 a. n. 2. Ante, 1177, n. y.—18 177. 1—See form, Morg. 596.

(g) See 18 East, 8.

(h) See the plea, ante, 998.—2 Saund. 176.

(i) See the plea, ante, 998.

ON  
RECORDS.  
—  
ON  
RECOGNIZ-  
ANCES.  
—  
the same  
count stat-  
ing the re-  
cord (k).  
[\*1182]

covery,"] remaining in the said court of our said lord the king, before the king himself, [or, *in C. P.* "of the Bench aforesaid,"] as he the said plaintiff hath above in his said declaration in that behalf alleged (l). And this the said plaintiff is read to verify by the said record, (of — Term, in the — year of the reign of our said lord the king, in the — roll, and he prays that the said term and roll aforesaid, may be inspected and seen by the said court [or, *in C. P.* "by the justices,"] here.) And because the said court [or, *in C. P.* "the said justices,"] are not yet advised what judgment to give of and upon the premises, "a day is therefore given to the parties aforesaid, before our said lord the king, at Westminster, until — [or, *by original, in K. B.* "until — wheresoever, &c."] to hear the judgment of the said court thereupon, for that the said court of our said lord the king, now here, are not yet advised thereof, &c. of, *in C. P.* "a day is therefore given to the parties aforesaid here, until — to hear the judgment thereupon, for that the said justices here are not advised thereof."]

The like in  
a different  
court (m).

[*Precludi non, as ante, 1145, first form.*]—Because he saith, that there is such record of the said recognizance, [or, *if a judgment, "recovery,"* remaining in the said court of our said lord the king, before the king himself, [or, "of the Bench aforesaid,"] as the said plaintiff hath above in his said declaration in that behalf alleged; and this the said plaintiff is ready to verify by the said record, when, where, and in such manner as the court [or, *in C. P.* "the justices,"] here shall direct and award, and he prayeth that the said record may be seen and inspected by the court [or, *in C. P.* "by the said justices,"] here; and because the said plaintiff hath not the said record now ready here in court, he is commanded to have the said record here, on, &c. [or, *by original, "on, &c. wheresoever, &c."*] and that he fail not at his peril, the same day is given to the said defendant at the same place [or *in C. P.* "here, &c."]

To plea of  
no *ca. sa.*  
against  
principal,  
setting out  
*ca. sa.* (n).

[*Precludi non, as ante, 1145, first form.*]—Because he saith, that the said plaintiff, after the recovery of the said judgment against the said F. as in the said declaration is mentioned, and before the commencement of this suit, to wit, on the — day of — in the — year of the reign of our said lord the king, sued and prosecuted out of the court of our said lord the king, before the king himself, the said court then and still being holden at Westminster, in the county of Middlesex aforesaid, a certain writ of our said lord the king, called a *capias ad satisfaciendum*, up

(k) See the plea, ante, 994, and the forms of replications, 7 Wentw. 68.—1 Rich. C. P. 441.—2 Id. 218.—Lil. Ent. 182, 404, and 474.—1 Saund. 92, 8.—Tidd's Forms, 4th ed. 304.—Com. Dig. Plender, 2 W. 18; and as to the form of this replication, 2 Marsh. 354. It may be as well to observe that a recognizance is not a record until it is enrolled. 1 B. & Ald. 153. The forms vary from the above in 1 Rich. C. P. 441.—2 Rich. C. 218.—1 Lil. Ent. 182, 183. The conclusion is thus: "and this the said plaintiff is ready to verify by the said record, and he prayeth that the said record may be seen and inspected by the court (or "justices") here, and because the said plaintiff hath not the said record now ready

here in court, it is told by the said court here to the said plaintiff, that we have the said record here on — the same day is given to the said defendant here," &c.

(l) Some of the forms here refer to the term and roll, see Tidd's Forms, 4th edit. 305.—Saund. 92, 8; but others do not, see 2 Rich. P. 218.—7 Wentw. 68.

(m) See Forms, 7 Wentw. 114.—1 Saund. 92, 8.—Tidd's Forms, 4th edit. 305.

(n) See the plea, ante, 995, and the forms of replications, 7 Wentw. 69, and Index, Clift. Ent. 188. The defendant cannot verify that the *ca. sa.* did not lie in the sheriff's office four clear days, 7 B. & C. 800.

ON  
RECORDS.  
ON RECOGNIZANCES.

the said judgment against the said E. F. directed to the sheriff of — (being in the county which the *venue* in the said action against the said E. F. was (o) laid,) by which said writ our said lord the king commanded the said sheriff (p) — that he should take the said E. F. if he should be found in his bailiwick, and him safely keep, so that he might have his body before our said lord the king, at Westminster, on, — to satisfy the said plaintiff £— for his damages which he had sustained, as well by reason of the not performing certain promises and undertakings then lately made to the said plaintiff by the said E. F. as for his costs and charges by him about his suit in that behalf expended; whereof the said E. F. was convicted, as appeared to our said lord the king of record, and that the said sheriff should have there that writ. Which said writ afterwards, and before the said return thereof, to wit, on, &c. at, &c. (*venue*) aforesaid, was delivered by the said plaintiff to — esq. who then and there, and from thenceforth until, and at, and after the return of the said writ, was sheriff of — aforesaid, to be executed in due form of law. At which day, to wit, on, &c. (*the return day of the writ*) before our said lord the king, at Westminster, came the said plaintiff in his own proper person, and the said sheriff, to wit, —, esq. on that day, returned to the said court of our said lord the king, at Westminster aforesaid, on the said writ, that the said defendant was not found in his bailiwick (1). As by the said writ of *capias ad satisfaciendum*, and the return thereof, duly affiled (q), and remaining of record, in the said court of our said lord the king, before the king himself, more fully appears. And this the said plaintiff is ready to verify by the said record, wherefore he prays judgment, and his debt aforesaid together with his damages by him sustained on occasion of the detaining thereof, to be adjudged to him, &c. (r).

[*Precludi non, as ante, 1145, first form.*]—Because he saith, that after the recovery of the said judgment against the said E. F. and before the exhibiting of the said bill of the said plaintiff in this behalf, [or, in *C. P.* “before the commencement of this suit,”] to wit, on the — day — “in the — year of the reign of our lord the now king, he the said plaintiff sued and prosecuted, &c.—[*State the issuing of the ca. sa. and the sheriff's return of non est inventus, and the reference to the writ and return, as in the above form.*]—And the said plaintiff further saith, that the said E. F. at the time of issuing of the said writ of *capias ad satisfaciendum*, and at the return thereof, was living, to wit, at Westminster aforesaid, in the county aforesaid. And this, &c.—[*Conclude with a verification, (t) as ante, 1170.*]

To plea of death of principal before return of *ca. sa.* stating a *ca. sa.* and return, and that the principal was then living (s).

[\*1184]

(o) If this be not so, the defendant may traverse the allegation or rejoin the fact, 16 *East*, 89.

(p) Examine carefully with the writ of *ca. sa.*

(q) *Semble*, the allegation of filing is unnecessary. *Tidd's Prac.* 9th edit. 1099.

(r) This replication need not conclude with verification, but may conclude with a prayer that the record may be inspected, as *ante*, *Bill*, instead of the above prayer, see 2 *Marsh.* 44.—7 *Taunt.* 30. S. C. and that case has

been since fully confirmed by the Court of King's Bench on special demurrer; but see 2 *T. R.* 576.

(s) See the plea, *ante*, 895, and the forms of replication, *Morg.* 545.—2 *East*, 812.—*Clift.* 188.—7 *Wentw. Index*, 631.—*Tidd*, 9th edit. 1099.

(t) *Semble*, that this replication, which states a new fact, should conclude with a verification, 2 *T. R.* 576.—*Morg.* 545, 6; but see 2 *Marsh.* 570, and note (x) *supra*.

(1) As to the necessity of an actual issuing and return of a *ca. sa.* see 3 *Johns.* 514.

ON JUDG-  
MENTS (u). [See the pleas, ante, 996 and replication, 7 Wentw. Index, 632. The replications to the plea, of nul tiel record, are precisely as ante, 1181, 2.]

ON STAT-  
UTES. [Precludi non, as ante, 1145, first form.]—Because he saith, that the said writ of latitat in the said [second] plea mentioned, was sued out, and the said rule of the said court and recovery in that plea mentioned, were had and obtained by fraud and covin, contrary to the form of the Statute in such case made and provided. And this, &c.—[Conclude with a verification, as ante, 1170.]

To plea of compromise by rule of court, that it was obtained by fraud (w). [Precludi non, as ante, 1145, first form.]—Because he saith, that the said judgment of conviction in the said plea to the said [first] count of the said declaration mentioned, was had and obtained by fraud and covin. And this, &c.—[Conclude with a verification, as ante, 1170.]

To plea of former conviction, that it was obtained by fraud (x).

## [\*1185] \*REPLICATIONS IN COVENANT.

TO PLEAS  
IN COVE-  
NANT. [The similiter in covenant is the same as in assumpsit, ante, 1144. Precludi non, as ante, 1145, first form.]—Because he saith, that the said défendant, of his own wrong, and without the leave or license of the said plaintiff, to the said défendant, for that purpose first given and granted, did plough and break up, &c. [Enumerate the acts complained of, as in the declaration.]—And this the said plaintiff prays may be inquired of by the country, &c.

To plea of license, denying the license (a).

Other rep-  
lications. As the pleas in covenant most frequently conclude to the country, few special replications occur in practice, and it is sufficient to refer to the forms, indexed in 5 Wentw. Index, cii. to cxliv.

Conclusion  
with a ver-  
ification. The conclusion of a replication with a verification, is as follows:—  
“And this the said plaintiff is ready to verify, wherefore he prays judgment and his damage by him sustained, by reason of the said breach of covenant [first] above assigned, to be adjudged to him,” &c. (b).

(u) The replication must conclude with a verification, 2 T. R. 570.

(w) See the plea, ante, 998, and the forms, 7 Wentw. Index, 632, and 4 Hen. 7, c. 20.—  
Bac. Ab. Actions, Qui tam, D.

(x) See the plea, ante, 999, and the pre-

ceding note.

(a) See the plea, ante, 1001, and the forms 9 Wentw. 24.—See replications *de injuria*, 8 Wentw. 428, 4.

(b) See the form, 8 Wentw. 282.

## \*REPLICATIONS IN CASE.

And the said plaintiff, as to the said plea of the said defendant by him above pleaded, and of which he hath put himself upon the country, doth the like; and because the said defendant hath, as to the [first and second] counts of the said declaration, confessed the said action of the said plaintiff, the said plaintiff prays judgment for his damages by him sustained on occasion of the committing thereof to be adjudged to him, &c. and thereupon it is considered by the court here, that the said plaintiff ought to recover against the said defendant his damage by him sustained, by reason of the committing of the said grievances in the said [first and second] counts mentioned, but because it is unknown to the court here, what damages the said plaintiff hath sustained on occasion thereof, and because it is convenient and necessary that there be but one taxation of damages in this suit, therefore let such taxation and the giving of judgment in this behalf be stayed, until the trial of the issue above joined between the parties aforesaid, and as well to try the said issue as to inquire what damages the said plaintiff hath sustained on occasion of the committing of the said grievances, in the said [first and second] counts of the said declaration mentioned, let a jury thereupon come, &c.

Replication (to plea, confessing causes of action in certain counts, and general issue to residue) taking judgment for causes of action confessed, and *similiter* to general issue and award of *venire*, as well to try issue as to assess damages, to cause of action confessed (a).

[*Similiter to the general issue, as ante, 1144.*].—And as to the said pleas of the said defendant, by him [secondly and thirdly] above pleaded, the said plaintiff saith, that he, by reason of any thing by the said defendant in those pleas above alleged, ought not be barred from having and maintaining his aforesaid action against the said defendant, in respect of the grievances in the introductory part of those pleas mentioned; because he saith, that the said defendant, at the said time when, &c. in the said [first and second] counts mentioned, of his own wrong, and without the cause by the said defendant, in his said [second and third] \*pleas, or either of them respectively mentioned, did commit the said grievances in the introductory part of those pleas mentioned, in manner and form as the said plaintiff hath above thereof complained against the said defendant, to wit, at, &c. (*venue*) aforesaid. And this the said plaintiff prays may be inquired of by the country, &c.

To pleas justifying words *de injuria* (b)

[ \*1187 ]

And the said plaintiffs, as to the said plea of the said defendant [lastly] above pleaded, say, that by reason of any thing above pleaded by the said defendant in that respect, they ought not to be barred from having their said action against him, because they say, that the said L. at the time of his death, had not any goods, chattels, rights, or credits, to the value of

Replication (to plea in trover that intestate had *bona notabilia* in several dioceses) averring *bona notabilia* in one diocese (c).

(a) See the plea and notes, ante, 1081.

the forms and law, 1 Saund. 244, n. 7.

(b) See the pleas, ante, 1081 to 1040, and

(c) See the plea, and notes, ante, 1040.

£—in the diocese of [Chester,] aforesaid, as by the said plea is above supposed. And this they pray may be inquired of by the country, &c.

[\*1188]

## \*PLEAS IN BAR, IN REPLEVIN.

IN  
GENERAL.  
1. *Simili-  
ter to non  
cepil (a).*

And the said plaintiff as to the said plea of the said defendant by him [first] above pleaded, and whereof he hath put himself upon the country, doth the like.

2. Com-  
mence-  
ment of a  
plea in bar  
to an  
avowry  
(b).

And the said plaintiff as to the said avowry of the said defendant, saith that the said defendant by reason of any thing by him in that avowry above alleged, ought not to avow the taking of the said cattle, [*or*, "goods and chattels," *as in the declaration*,] in which, &c. and unjustly, &c. because he saith, that, &c.

3. The like  
to a cogni-  
zance (c).

And the said plaintiff as to the said cognizance of the said defendant, saith, that the said defendant, by reason of any thing by him in that cognizance above alleged, ought not, as bailiff of the said E. F. to acknowledge the taking of the said cattle [*or*, "goods and chattels," *as in the declaration*,] in the said place [*as in the declaration*,] in which said place [*as in the declaration*,] in which, &c. and justly, &c. because he saith, that, &c.

4. The like  
to an  
avowry  
and cogni-  
zance.

And the said plaintiff as to the said avowry and cognizance of the said C. D. and E. F. by them [first] above made, saith, that by reason of any thing therein alleged, the said C. D. in his own right ought not to avow, that the said E. F. as bailiff of the said C. D. ought not to acknowledge the taking of the said cattle, goods, and chattels, [*as in the declaration*,] in the said place [*as in the declaration*,] in which, &c. and justly, &c. because he saith, that, &c.

5. Com-  
mence-  
ment of  
a second  
plea in  
bar, by  
leave, &c.

[\*1189]

And for a further plea in this behalf to the said avowry [*or*, "cognizance,"] of the said C. D. the said plaintiff by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, saith, that the said C. D. by reason of any thing in his said avowry [*or*, cognizance,"] alleged, "ought not to avow, [*or*, "as bailiff of the said E. F. ought not to acknowledge,"] the taking of the said cattle, goods, and chattels, [*as in the declaration*,] of the said plaintiff, in the said place, [*as in the declaration*,] in which, &c. and justly, &c. because he saith, that, &c.

6. Conclu-  
sion to the  
country.

And this the said plaintiff prays may be inquired of by the country, &c.

(a) See the plea, ante, 1042.

(b) See forms, Plead. A. 420, 476, 483.—

Morg. 598.

(c) See a form, Plead. A. 472.

And this the said plaintiff is ready to verify, wherefore inasmuch as the said defendant hath above acknowledged the taking of the said cattle, [goods, and chattels, as in the declaration,] in the said place, [as in the declaration,] in which, &c. he the said plaintiff prays judgment and his damages, by reason of the taking and unjustly detaining the same, to be adjudged to him, &c.

IN  
GENERAL.  
7. Conclusion, with a verification (d)

And this the said plaintiff is ready to verify, wherefore inasmuch as the said C. D. in his own right hath avowed, and the said E. F. as bailiff of the said C. D. hath acknowledged the taking of the said [cattle,] goods, and chattels, in the said place in which, &c. he the said plaintiff prays judgment and his damages, by reason of the taking and unjustly detaining thereof, to be adjudged to him, &c.

8. The like to an avowry and cognizance.

[*Commencement of plea in bar, as ante, 1188, &c.*]—Because he saith, that the said plaintiff [or, "E. F."] did not hold or enjoy the said [dwelling-house] in which, &c. with the appurtenances, as tenant thereof to the said C. D. [or, "the said G. H."] under the said supposed demise thereof, in the said avowry [or, "cognizance,"] mentioned, in manner and form (f) as the said C. D. hath above in his said avowry [or, "cognizance,"] in that behalf alleged. And this the said plaintiff prays may be inquired of by the country (g), &c.

FOR RENT.  
Traverse of the demise (e).

\*[*Commencement of plea in bar, as ante, 1188.*]—Because he saith, that no part of the said supposed rent, in the said avowry [or, "cognizance,"] mentioned, was or is in arrear, from the said plaintiff to the said C. D. [or, "G. H."] in manner and form as the said C. D. hath, in his said avowry [or, "cognizance,"] in that behalf alleged. And this the said plaintiff prays may be inquired of by the country, &c.

\*1190  
No rent in arrear (h).

[*Commencement of plea in bar, as ante, 1188.*]—Because he saith, that the said C. D. at the said time when, &c. was not the bailiff of the said E. F. in manner and form as the said C. D. hath above in his said cognizance in that behalf alleged. And this the said plaintiff prays may be inquired of by the country (i), &c.

That defendant was not bailiff (i).

(d) See form, Plead. A. 573, 478, 484.—2 Rich. C. P. 342, 354.—Morg. 594, 5, 7.

(e) As to this plea in bar, see 1 Saund. 347 c. n. 4.—2 Leon. 169. Under this plea in bar, when the party distraining claims derivatively from the lessor, the plaintiff may dispute the derivative title, 6 Taunt. 202. But generally the plaintiff cannot dispute his landlord's title; see the cases in 1 Chit. jun. on Contracts 99.—9 B. & C. 245.—8 B. & C. 471. If the tenant (plaintiff) has paid the rent to a superior landlord under a threat of distress, he should plead specially, 6 Taunt. 524. The above plea disputes the tenancy, as stated in the avowry. If the plaintiff succeeds on this plea, the plea of *rien en arriere* is immaterial. 3 B. & A. 546. Infancy may be pleaded with this plea or the plea of *rien en arriere*. 5 Taunt. 340.—1 Marsh. 74, S. C. Unless there be an actual demise to the tenant at a fixed rent, the landlord cannot distrain, but must sue for use and occupation, 2 Taunt 148.—5 B. & A. 322; and such a defence is available under this plea.

In the case of *Jones v. Powell*, 5 B. & C.

647.—8 D. & R. 416, S. C. In replevin, the defendant avowed that he demised the close in which, &c. (amongst other things) to A. B. and because the cattle were there, he distrained them for rent in arrear. The plaintiff pleaded in bar that the cattle were not *levant* and *couchant* upon the close in which, &c. It was held, on demurrer, that this plea was bad, first, for not showing how the cattle came upon the land; secondly, for not stating that they were not *levant* and *couchant* upon any part of the lands demised.

(f) These words always embrace the terms of the tenancy, as stated in the avowry; see 6 Bing. 107.

(g) This conclusion to the country is proper. Morg. 593.—1 Saund. 153. *Ld. Raym.* 641.

(h) *Ante*, 1189, note e. A plea of distress should aver that satisfaction was had out of it, 4 Moore, 409.—5 *Id.* 542.

(i) See *ante*, 1189, n. e. Evidence of a subsequent ratification and approval of the act will be sufficient, although no prior command was given, 11 Mod. 112. *Vin. Ab.* Bailiff D.

## FOR RENT.

That the landlord by the demise, partial with all his interest in the premises, leaving no reversion, enabling him to distrain (k).

[*First plea in bar, denying the demise as ante, 1189; second plea, commencement, as ante (k), 1188*].—Because he saith, that by the said supposed demise in the said [cognizance] mentioned, he the said T. W. did demise and grant the said dwelling-house in which, &c. unto the said plaintiff for all the residue and remainder of his the said T. W.'s estate, term, and interest, of and in the said dwelling-house in which, &c. and that the said T. W. had not then or at the said time when, &c. or at any time during the said supposed demise to the said plaintiff any reversionary estate, term, or interest, of or in the said dwelling-house in which, &c. or any part thereof, expectant, or to take effect upon, or at any time after the expiration of the term granted to the said plaintiff by the said supposed demise. And this the said plaintiff is ready to verify, &c.—[*Conclude as ante, 1189.*]

Payment of rent to ground landlord (l).

[\*1191]

[*Commencement of plea in bar, an ante, 1188.*].—Because he saith, that the said C. D. from the — day of — A. D. — and from thence for a long space of time, to wit, from thence, until and upon the — day of — A. D. — held the said [dwelling-house] in which &c. as tenant thereof to one E. F. at and under a certain yearly rent, to wit, the yearly rent or sum of £— of lawful, &c. to be paid at the four most usual feasts, or days of payment of rent in the year, that is to say &c. [*here enumerate the quarterly "days of payment"*] by even and equal portions. And the said plaintiff further saith, that before the said time when, &c. to wit, on the — day of — A. D. — and on divers other days and times between that day and the — day of — A. D. — divers sums of money of the said yearly rent, in the whole amounting to a large sum of money, to wit, the sum of £— of like lawful money, became and were due and in arrear from the said C. D. to the said E. F. and thereupon the said E. F. on divers days and times, after the said several days and times when the said several sums of money so due and in arrear as aforesaid, and before the said time when, &c. required payment of the said several sums of money so due and in arrear as aforesaid, of the said plaintiff as being the occupier of the said [dwelling-house] in which &c. and thereupon the said plaintiff, in order to prevent the goods and chattels at the said several times being in the said [dwelling-house] in which &c. from being distrained, at the said several times when the said plaintiff was so required as aforesaid, paid the said several sums of money so due and in arrear from the said C. D. to the said E. F. as aforesaid, which said several sums of money, so paid by the said plaintiff to the said E. F. as aforesaid, greatly exceed the amount of the rent due and in arrear from him the said plaintiff to the said C.

(k) *Vide* 2 Wils. 875.—5 Bingham. 25. If the landlord demised the whole of his interest in the premises; he has no right to distrain, *id.*

(l) See 4 T. R. 511. Payment of a land-tax Dougl. 824, 625; and see 6 Taunt. 624.—2 Marsh. 220.—*Ante*, vol. i. Index, "*Replevin*." An allegation of payment of land-tax and paying rates for any period preceding the current year, is no plea in bar to an avowry for rent in arrear, 1 B. & B. 37.—8 Moore, 287, S. C.; and a plea in bar stating "*that divers sums of money amounting to a certain sum had been from time to time duly assessed*

*and rated upon the premises for land-tax, and from time to time paid by the plaintiff, wherefore he deducted the said sum, being the amount of the tax to which the defendant, as landlord, was liable to bear in respect of the rent,*" was held bad, for not stating the specific periods for which the respective sums were assessed or paid, and in not stating that the payment was made after the rent distrained for had accrued or was accruing, 3 B. & A. 516. As to a plea of payment of property tax, see 1 B. & A. 123.



D. in manner and form as the said C. D. hath above in his said avowry in that behalf alleged. And this, &c.—[*Conclude as ante*, 1189, *seventh form*.]

FOR RENT.

And the said plaintiff, as to the said [cognizance] of the said C. D. by him above made, saith, that the said C. D. ought not, by reason of any thing in that [cognizance] alleged, to acknowledge the taking of the said [goods and chattels] in the said [place] in which, &c. and justly, &c. because as to the sum of £— parcel of the said rent in the said [cognizance] alleged to be due and in arrear, and unpaid from the said plaintiff to the said E. F. the said plaintiff saith, that no part of the said sum of £— at the said time when, &c. was in arrear in manner and form as the said C. D. hath in his said [cognizance] above alleged. And this, the said plaintiff prays may be inquired of by the country, &c. And as to the sum of £— residue of the said rent or sum of £— in the said [cognizance] alleged to be due and in arrear, and unpaid from the said plaintiff to the said E. F. the said plaintiff saith, that after the said — day of — A. D. — (day when the rent fell due) and before the said time when, &c. to wit, on the — day of — in the year aforesaid, at, &c. (venue) aforesaid, the said plaintiff tendered and offered to pay to the said E. F. [or, “to G. H. then and there being the bailiff of the said E. F. and by him duly authorized to receive the said rent, and make the said distress (n),”] the said sum of £— which the said E. F. then and there refused to accept and receive of and from the said plaintiff; and that after the said tender, and before the said distress was so made and taken as aforesaid, no request of demand of the said sum of £— was ever made by or on the behalf of the said E. F. And this, &c.—[*Conclude with a verification as ante*, 1189, *seventh form*.]

No rent in arrear as to part, and tender as to the residue (m)

[\*1192]

[*Commencement of plea in bar, as ante*, 1188.]—Because he saith, that the said defendant, after the making of the said demise in the said avowry mentioned, and before any part of the said rent therein mentioned became due or in arrear, to wit, on, &c. A. D. — in the county aforesaid, with force and arms, &c. entered into [a certain messuage or dwelling-house, parcel of] the said demised premises in the said avowry] alleged to have been demised, in and upon the possession of the said plaintiff thereof, and him the said plaintiff from his possession thereof ejected, expelled, put out, amoved, and kept and continued the said plaintiff so ejected, expelled, put out, and amoved from his possession thereof, from thence, until and upon and after the said — day — A. D. —. And this, &c.—[*Conclude with a verification, as ante*, 1189, *seventh form*.]

Eviction (o).

[*Commencement of pleas in bar, as ante*, 1188.]—Because he saith, that the said [place, as in the declaration in which, &c. now is, and at the said time when, &c. was the close, soil, and freehold of the said plain-

DAMAGE FEASANT. To avowry damage feasant by freeholder, denial of his title (p).

(m) As to this plea, see ante, 1018, note.—147 a.—Clift. Ent. 646. Com. Dig. 3. See a plea of tender on the land, ante, 549, and Morg. 595, 6, 7. See another plea, ante, 549.

(n) Query, if this averment be sufficient, 5 Rep. 76 a.—Cro. Eliz. 818. Rol. Rep. 1.—Gillb. Distress, 88. Bac. Ab. Tender.

(o) See the pleas of eviction, and the notes.

ante, 998; and 1 Saund. 204, n. 2.

(p) See the avowry, ante, 1058. As to this plea in bar, see 2 Saund. 206 a, n. 22.—Com. Dig. Pleader, 8 K. 22.—1 Co. 64 a. If there be any doubt as to the plaintiff being a freeholder, the plea in bar should merely traverse the defendant's title without stating the plaintiff's, which in all cases is sufficient.

DAMAGE  
FEASANT.

tiff, and not the close, soil, and freehold of the said defendant, [or, "G. H."] in manner and form as the said defendant hath above in his said avowry, [or, "cognizance,"] in that behalf alleged. And this the said plaintiff prays may be inquired of by the country, &c.

To avow-  
ry damage  
feasant by  
tenant,  
traverse of  
the de-  
mise (g).

[*Commencement of plea in bar, as ante*, 1188.]—Because he saith that the said E. F. in the said avowry [or, "cognizance,"] mentioned did not demise the said [place] in which, &c. to the said defendant, in manner and form as the said defendant hath above in his said avowry in that behalf alleged. And this the said plaintiff prays may be inquired of by the country, &c.

To an  
avowry  
damage  
feasant by  
freeholder  
or lease-  
holder, that  
defendant  
demised  
locus in quo  
to plaintiff  
(r).

[\*1196]

[*Commencement of plea in bar as ante*, 1188.]—Because he saith that long before the said time when, &c. to wit, on, &c. at, &c. (venue) aforesaid, the said defendant demised the said place in which, &c. with the appurtenances, to the said plaintiff, to have and to hold the same to the said plaintiff, from the — day of — in the year last aforesaid for one year then next following, and fully to be complete and ended, and so from year to year for so long time as the said defendant and plaintiff should respectively please; by virtue of which said demise, the said plaintiff, long before the said time when, &c. to wit, on, &c. aforesaid, entered into the said [place] in which, &c. with the appurtenances, and became, and until and at the said time when, &c. was possessed thereof, and being so possessed thereof, the said plaintiff afterwards, and during the continuance of the said tenancy, and before the said time when, &c. to wit, on, &c. put the said cattle in the said declaration mentioned, into the said place in which, &c. to feed and depasture on the grass there then growing, and which said cattle lawfully in and upon the said [place] in which, &c. feeding and pasturing on the grass there then growing, from thence until the said defendant, of his own wrong, at the said time when, &c. during the continuance of the said tenancy, took the said cattle in the said declaration mentioned, in and upon the said [place] in which, &c. and detained the same against sureties and pledges, until, &c. in manner and form as the said plaintiff hath above complained against him the said defendant. And this, &c.—[*Conclude with a verification, as ante*, 1189, *several form*.]

To avow-  
ry for dis-  
tress dam-  
age fea-  
sant, that  
plaintiff's  
cattle es-  
caped into  
locus in quo  
through  
the defect  
of fences  
which the  
occupier  
ought to  
have re-  
paired (s).

[*Commencement of plea in bar, as ante*, 1188.]—Because he saith that the said plaintiff, before and at the said time when, &c. was lawfully possessed of and in a certain close, &c. [*state the plaintiff's possession of the adjoining close, and the obligation of the occupier of the close in quo to repair the fence, and that the fence was out of repair, and that plaintiff's cattle thereby escaped into locus in quo, as in the form ante*, 1103, and 2 Saund. 284, 285; 1 Taunt. 529; and after state

(g) See the avowry, ante, 1058.

(r) The demise must be stated according to the facts; see forms, ante, 1058, 1102. As to the demise being found variant, see Hob. 72, 8.

(s) See the form and law, 2 Saund. 284 c, 285, n. 4. 289, n. 7.—Plead. A. 476, 7, 8; and the notes to the form, ante, 1103 and 780.

When the occupier of the locus in quo is bound to fence against an highway, see the form, law, 2 Hen. Bl. 527.—3 Wils. 126. That form will also serve as a plea in bar to an avowry for rent, and should be pleaded, 2 Saund. 284 c.—5 B. & C. 647.—8 D. & R. 5. C.

*such escape, proceed as follows:]\** and remained therein until the said defendant, before the said plaintiff had or could have any notice that the said cattle were in the said place in which, &c. (t) to wit, at the said time when, &c. of his own wrong, took the said cattle in the said place in which, &c. and unjustly detained the same against sureties and pledges, in manner and form as the said plaintiff hath above thereof complained against the said defendant. And this, &c.—[*Conclude with a verification, as ante, 1189, seventh form; see 2 Saund. 285 a.*]

DAMAGE  
FRASANT.

[*Commencement of plea in bar, as ante, 1188.*—Because he saith, [\*1197] that the said [field or place] called, &c. now lieth, and at the said time when, &c. did lie, and from time whereof the memory of man is not to the contrary, hath lain contiguous and next adjoining on one side thereof to a certain [field or place] called, &c. situate and being in the said parish of — in the county of — and separated and divided therefrom by a certain hedge or fence, and in which said hedge or fence, long before and at the said time when, &c. there was and still is a certain gate and gateways leading from and out of the said [field or place] called, &c. into the said [field or place] called, &c. in which, &c. ; and the said plaintiff further saith, that the said defendant, and all other the tenants and occupiers of the said [field or place] called, &c. in which, &c. for the time being, from time whereof the memory of man is not to the contrary, have repaired and maintained, and have been used and accustomed to repair and maintain, and of right ought to have repaired and maintained, and still of right ought to repair and maintain the said gate or gateway in the said hedge or fence between the said [field or place] called, &c. in which, &c. and the said [field or place] called, &c. so often as occasion hath required, and to keep the said gate or gateway in the said hedge or fence shut and fastened, to prevent the escape of cattle from and out of the said [field or place] called, &c. into the said [field or place] called, &c. in which, &c. ; and the said plaintiff further saith, that before and at the same time when, &c. he the said plaintiff was lawfully possessed of and in the said [field or place] called, &c. and being so possessed thereof, he the said plaintiff, a little before the said time when, &c. put the said cattle in the said declaration mentioned (the same being the cattle of the said plaintiff,) into the said [field or place] called, &c. to feed and depasture the grass there growing and being, as it was lawful for him to do for the cause aforesaid ; and the said plaintiff further saith, that afterwards, and a little before the said time when, &c. because the said gate in the said hedge or fence, between the said [field or place] called, &c. in which, &c. and the said [field or place] called, &c. was open, and not shut and fastened, the said cattle in the said declaration mentioned, at the said time when, &c. strayed and went without the knowledge and against the will of the said plaintiff, from \*and out of the said [field or place] called, &c. into the said [field or place] called, &c. in which, &c. and remained therein until, &c.—[*Conclude as in the preceding form, ante, 1196, from the asterisk.*]

The like,  
stating de-  
fendant's  
obligation  
to keep a  
gate shut  
(u).

[\*1198]

[*Commencement of plea, in bar, as ante, 1188.*—Because he saith, that the said place in which, &c. before and at the said time when, &c. and

The like  
that locus  
in quo ad-

(t) As to this allegation, see 2 Saund. 285, a. 1; but see form, Pl. A. 476, 7, 8, which omits it.

(u) See the note to the last form.

DAMAGE  
FEASANT.

joins a  
common  
in which  
plaintiff  
had right  
of com-  
mon, and  
that the  
cattle es-  
caped  
through  
defect of  
fence be-  
tween the  
common  
and locus  
in quo,  
which de-  
fendant  
ought to  
have re-  
paired (w)

from time whereof the memory of man is not to the contrary, hath beer and still is, contiguous and next adjoining to a certain common or waste situate, lying, and being, in the parish aforesaid in the county aforesaid and that the said defendant, and all other the tenants and occupiers of the said close, in which, &c. for the time being, from time whereof the memory of man is not to the contrary, hitherto of right have maintained and repaired, and until the neglect hereinafter mentioned have been used and accustomed to maintain and repair the fence between the said close, in which, &c. and the said common or waste called —, when, and as often as occasion hath required, and should require, to prevent cattle lawfully being in and upon the said common or waste called —, from escaping from and out of the same into the said close, in which, &c. And the said plaintiff further saith that, &c. [*Here state the seisin in fee and prescriptive right of common, as ante, 1059. If by a copyholder, state the copyhold and right of common as ante, 1111. Or if the plaintiff be a tenant, state the demise, as ante, 1102, 1058, or, 560, and then proceed as follows:*] and being so possessed thereof, he the said plaintiff afterwards, and before the said time when, &c. to wit, on the said — day of —, put his said cattle in the said declaration mentioned, the same then and there being his own commonable cattle *levant* and *couchant*, in and upon the said messuage, lands, and premises, with the appurtenances of the said plaintiff, into the said common or waste called —, to depasture the grass there then growing, and to use his said common of pasture there, as it was lawful for him to do for the cause aforesaid, and the said cattle remained there, using the said common or pasture there, until the escape thereof hereinafter mentioned; and because the said fence, between the said common or waste called, &c. and the said close, in which, &c. before and at the said time when, &c. was ruinous, broken down, insufficient, and in decay for want of necessary repairing \*and amending thereof, the said cattle of the said plaintiff in the said declaration mentioned, a little before the said time when, &c. to wit, on the said — day of — A. D. — aforesaid, escaped out of the said common or waste called, &c. into the said close, in which, &c. through the said defect of the said fence, and remained therein until, &c. — [*Conclude as in the form, ante, 1196, from the asterisk.*]

To avowry  
damage  
feasant  
that plain-  
tiff had  
right of  
common  
in locus in  
quo (x).

[*Commencement of plea in bar, as ante, 1188.*]—Because he saith, that, &c. — [*Here state the seisin in fee and prescriptive right of common in locus in quo, as ante, 1059; or if by a copyholder, as ante, 1111; and if the plaintiff be a tenant after the seisin and prescriptive right of common, state the demise and entry, as ante, 560, or 1058, and proceed as follows:*] and the said plaintiff being so possessed, he the said plaintiff afterwards, and before the said time when, &c. to wit, on the day and year in the said declaration mentioned, turned and put the said cattle, being his own commonable cattle, *levant* and *couchant*, in and upon the said [messuage and land] with the appurtenances, into the said close, in which, &c. to feed and depasture on the grass there then growing, and to use the said common of pasture of the said plaintiff there, as he lawfully might, and the said cattle

(w) See the notes to the form, ante, 1103, Suit at Law, 241, 2. 3 Plead. Am. 472. 2 1196, and a form, Morg. 605. Rich. C. P. 240.

(x) See the forms, 2 Wils. 269. Boote's

remained and continued therein, feeding and depasturing on the grass there then growing, and using the said common of pasture, until the said defendant of his own wrong, at the said time when, &c. took the said cattle in the said place, in which, &c. and unjustly detained the same against sureties and pledges, until, &c. in manner and form as the said plaintiff hath above thereof complained against him. And this, &c.—[*Conclude with a verification, as ante, 1189.*]

DAMAGE  
TRESPASS.

[*Commencement of plea in bar, as ante, 1188, seventh form.*].—Because he saith, that after the taking of the said cattle in the said place, in which, &c. by the said defendant, and before the impounding of the same, to wit, on the same day and year in the said declaration mentioned in the 'county aforesaid, the he said plaintiff tendered and offered to pay to the said defendant a certain sum of money, to wit, the sum of £—, of lawful money of Great Britain, as amends for the said damage done to the said defendant by the said cattle in the said place, in which, &c. as aforesaid, and which was then and there sufficient amends for the same; which said sum of £— the said defendant then and there wholly to accept from the said plaintiff, and unjustly detained the said cattle against sureties and pledges, &c. until, &c. in manner and form as the said plaintiff hath above thereof complained against the said defendant. And this, &c.—[*Conclude with a verification, as ante, 1189, form.*]

Tender of  
amends  
before im-  
pounding  
(y).

[\*1200]

## \*REPLICATIONS IN TRESPASS.

[\*1201]

*Similiter to general issue, as ante, 1154, and commencement of reply to the special plea as follows:*—[And the said plaintiff as to the said plea of the said defendant by him, [secondly] above pleaded, as to said several trespasses in the introductory part of that plea mentioned and therein attempted to be justified, saith, that the said plaintiff, by reason of any thing by the said defendant in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against the defendant, because he saith, that, &c.—[*Here state the substance of the replication.*]

IN  
GENERAL.Com-  
mence-  
ment of a  
replica-  
tion to a  
special  
plea in  
trespass  
called *pre-*  
*cludi non.*2. Conclu-  
sion with a  
verifica-  
tion.

And this the said plaintiff is ready to verify; wherefore the said plaintiff prays judgment and his damages by him sustained, by reason of the committing of the said trespasses to be adjudged to him, &c.

[*Precludi non ut supra.*].—Because he saith, that the said sum of

To plea of  
tender that  
the amends  
were not  
sufficient  
(a).

See the forms of plea in bar and reply, Morg. 608.—Gilb. Distress by Hunt, Co. 147 a.—3 Lutw. 1596.—See 1 Taunt. 261. See plea, ante, Where cattle, distrained damage done where in a private pound, and the disseisor admitted they were about to be for-  
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warded to a public pound, it was held, that a tender of amends made, while they were in the private pound, was not too late, 4 Bing. 280.

(a) See pleas, ante, 1063 to 1066, and as to this replication, Com. Dig. Pleader, 3 M. 86.—1 Marsh. 220, and the replications to pleas of tender, ante, 1151 to 1156.

IN  
GENERAL.

£— in the said plea mentioned, and therein alleged to have been tendered by the said defendant to the said plaintiff as aforesaid, was not sufficient amends for the said trespasses, in manner and form as the said defendant hath above in his said plea alleged. And this the said plaintiff prays may be inquired of by the country, &c.

To a plea of verdict recovered against plaintiff, denying the verdict was for same causes of action.

*De injuria* or *de son tort* *demesne* (b).

[\*1202]

[*Precludi non, ut supra.*—Because he saith, that the trespasses in the said declaration in this action mentioned, are not the same trespasses as those in the said last plea mentioned, and for and in respect whereof the said supposed judgment in the said last plea mentioned was recovered. And this the said plaintiff prays may be inquired of by the country, &c.

[*Precludi non, as ante, 1201.*—Because he saith, that the said defendant at the said time when, &c. of his own wrong, and without the cause by him in his said [second] plea \*alleged, committed the said several trespasses in the introductory part of that plea mentioned, in manner and form as the said plaintiff hath above in his said declaration complained against the said defendant. And this the said plaintiff prays may be inquired of by the county, &c.

I TO  
PERSONS.  
*De injuria* to *son assault* *demesne* (c).

[*Precludi non, as ante, 1201.*—Because he saith, that the said defendant at the said time when, &c. of his own wrong, and without the cause by him in his said [second] plea alleged, committed the said several trespasses in the said plea attempted to be justified, in manner and form as the said plaintiff hath above in the said [first] count of his said declaration complained against the said defendant. And this the said plaintiff prays may be inquired of by the country, &c.

To plea of *son assault* *demesne*, that E. F. was possessed of a house, and that plaintiff, as his servant, made the supposed assault to turn defendant out (d).

[\*1203]

[*Precludi non, as ante, 1201.*—Because he saith, that long before and at the said time when, &c. in the said [first] count mentioned, one E. F. was lawfully possessed of a certain [dwelling-house] with the appurtenances, situate and being in the [parish] aforesaid, and being so possessed thereof, the said defendant, just before the said time when, &c. in the said [first] count mentioned, was wrongfully and unjustly in the said [dwelling-house,] making a great noise \*and disturbance therein, and stayed and continued therein making such noise and disturbance, without the license or consent, and against the will of the said E. F. for a long space of time to wit until and at the said time when, &c. in the said [first] count mentioned, and

(b) See the form, 1 Rich. C. P. 150. When this replication is proper, see Com. Dig. Plead. F. 18, &c. 1 B. & P. 76.—2 Bla. Rep. 1165.—11 East, 70, 451.—2 Camp. 629, and ante, vol. i. Index, "*De Injuria.*" A replication *de injuria*, where it ought not to be used, is cured by verdict, Hob. 76.—Sir T. Raym. 50, but it is bad on general demurrer.—8 Lev. 65.

(c) See the pleas, ante, 1067 to 1071, and as to this replication in general, see Co. Di. Plea. 3 M. 16 and F. 18, &c. Skin. 387. See forms, 1 Ri. C. P. 150.—2 Rich. C. P. 57.—Plead. A. 447. The replication may in general be *de injuria* as in the above form; but when in fact the plaintiff made the first assault in

defense of his possession, &c.; or whenever, in answer to the defendant's plea of *son assault*, he relies upon new matter, he should not reply generally *de injuria*, but should state such new matter, as in the following forms, according to the facts, and in Carth. 280; and 2 Bla. Rep. 1165.—Ante, vol. i. Index, "*De Injuria.*"

(d) The general replication *de injuria* would, in this case, be improper, as the assault pleaded by the defendant is not here denied, but confessed and avoided. See a case precisely similar in Carth. 280; and 2 Bla. Rep. 1165.—Skin. 387; and the note to the preceding form. As to stating the defence of possession, see ante, 1073.

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thereby then and there greatly disturbed and disquieted the said E. F. and his family, in the peaceable and quiet possession, use, and enjoyment of the said [dwelling-house] whereupon the said plaintiff, at the said time when, &c. in the said [first] count mentioned, as the servant of the said E. F. and by his command, requested the said defendant to cease his said noise and disturbance, and to go and depart from and out of the said [dwelling-house] which the said defendant then and there refused to do; whereupon the said plaintiff, as such servant of the said E. F. and by his command, gently laid his hands upon the said defendant in order to remove the said defendant from and out of the said [dwelling-house,] as he lawfully might for the cause aforesaid, and which said laying of hands by the said plaintiff on the said defendant in manner and for the cause aforesaid, was the said supposed assault by the said defendant in his said [second] plea mentioned to have been committed by the said plaintiff, and thereupon the said defendant being thereby then and there greatly irritated and enraged, at the said time when, &c. in the said [first] count mentioned, of his own wrong committed the said trespasses in the introductory part of the [second] plea mentioned, in manner and form as the said plaintiff hath above thereof complained against the said defendant. And this the said plaintiff is ready to verify. And the said plaintiff is also ready to verify, that he did not assault the said defendant as in the [second] plea mentioned, elsewhere than in the said [dwelling-house] of the said E. F. Wherefore he prays judgment and his damages by him sustained, on occasion of the committing of the said trespasses in the introductory part of the said [second] plea mentioned, to be adjudged to him, &c.

[*Precludi non, as ante, 1201.*]—Because he saith, that the said plaintiff long before and at the said time when, &c. in the said [first] count mentioned, was and still is seised in his demesne as of fee, of and in a certain close, with the appurtenances, situate and being contiguous and next adjoining to the said close of the said defendant in the said [second] plea mentioned, and that the said plaintiff and all, &c. [*Here state the prescriptive or other right of way, as ante, 1118, &c. and then proceed as follows:*] wherefore the said plaintiff afterwards, and at the said time when, &c. in the said [first] count mentioned, was about to put his said cattle into the said close of the said plaintiff in the said [second] plea mentioned, to depasture the grass there then growing, and then and there endeavored to open the said gate in the said plea mentioned in order to lead his said cattle from and out of the said king's public highway, in and along the said way in the said close of the said defendant unto and into the said close of the said plaintiff as it was lawful for him to do for the cause aforesaid; and thereupon the said defendant at the said time when, &c. in the said [first] count mentioned, of his own wrong committed the said several trespasses in the introductory part of the said [second] plea mentioned, in manner and form as the said plaintiff hath above in his said declaration alleged. And this, &c.—[*Conclude with a verification, as ante, 1201.*]

To plea of defense of possession of close, as ante, 1075, that plaintiff had right of way over the close.

[\*1204]

[*Similiter to the general issue, as ante, 1144. To second plea precludi non, as ante, 1201.*]—Because, protesting that the said writ of our said lord the king, called a *latitat*, was not issued out of the said court of our

To justification under a *latitat* and

TO  
PERSONS.

warrant, protesting the issuing of the writ and warrant, and *de injuria* as to the residue of the plea(s)

[\*1205]

said lord the king before the king himself, directed to the said sheriff of — or delivered to the said sheriff to be executed, and that such warrant was not thereupon made by the said sheriff, or delivered to the said defendant in manner and from as the said defendant hath above in his said [second] plea in that behalf alleged; for replication nevertheless in this behalf the said plaintiff saith, that the said defendant at the said time when, &c. in the said [first] count of the said declaration mentioned, of his own wrong, and without the residue of the cause in his said [second] plea alleged (f), [made the said assault in the said first count mentioned, upon the said plaintiff, and pushed, forced, and thrust the said plaintiff from and out of the said messuage or dwelling-house in the said first count mentioned, into the said street therein also mentioned, and while the said plaintiff continued on the ground in the said street, pulled, hauled and dragged him upon his back through the mud and dirt in and along the said street, and for the distance and length of way in the said first count also mentioned, and thereby hurt, bruised, and wounded the said plaintiff and imprisoned him the said plaintiff, and kept and detained him in prison for the said "space of time in the said first count mentioned; and also at the said time when, &c. in the said second count of the said declaration mentioned, rent, tore, damaged, and spoiled the clothes and wearing apparel of the said plaintiff in the said second count mentioned, to wit, at, &c. (*venue*) aforesaid,] in manner and form as the said plaintiff hath, in and by the said [first and second counts of] his said declaration, above complained against the said defendant. And this the said plaintiff prays may be inquired of by the country, &c.

Replication to a plea justifying under a writ of *latitat*, a battery and bruising, &c. because plaintiff attempted a rescue, that defendant beat plaintiff more than was necessary (g).

To a plea of distress damage feasant that E. F. was seized of *locus in quo*, and demised same to plaintiff, wherefore defendant of his own wrong, &c. (h).

[*Precludi non, as ante, 1201.*]—Because he saith, that the said defendants, at the said time when, &c. in the said declaration mentioned, of their own wrong, committed the said trespasses in the introductory part of that plea mentioned, to a greater degree, and with more force and violence than was necessary for the purpose in that plea mentioned, in manner and form as the said plaintiff hath in and by the said declaration complained against the said defendants. And this, &c.—[*Conclude with a verification, as ante, 1201.*]

[*Precludi non, as ante, 1201.*]—Because he saith, that before the said times when, &c. and at the time of making the demise hereinafter next mentioned, and from thence hitherto, one E. F. was and still is seised in his demesne as of [freehold for the term of his natural life,] of and in the said out-house in which, &c. in the said [second] plea mentioned, and

(e) See the plea, ante, 1088. Where process or warrant is stated in the plea, the plaintiff cannot reply *de injuria* generally, but must either traverse the issuing of the writ or warrant, or that the trespasses were committed in due execution thereof, showing why, Com. Dig. Pleader, F. 18, 19, 20, &c.—1 B. & P. 76.—16 East, 82, and sometimes without showing why, 2 Young & Jer 304; and ante, vol. i. Index, "*De Injuria*."

(f) Or, instead of the long repetition between the brackets, say "*committed the trespasses in the introductory part of the said plea mentioned.*"

(g) As to the necessity of replying specially, see 7 Moore, 88.—2 Campb. 176.—Wils. 20.—5 B. & A. 220.—Ante, vol. i. Index, "*Trespass.*" As to what evidence allowed under, see 1 Stark. 56.—See ante, for plea, 1088, &c.

(h) See pleas, ante, 1092, 4.—The replication *de injuria* is in general sufficient, except where the plaintiff and defendant joint tenants in common, or when defendant justifies as servant, and this replication may often be useful, in order to narrow the evidence to be adduced upon the trial, 1 East, 212.



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PERSONAL  
PROPERTY

being so seized, long before the said time when, &c. to wit, on the — day of — A. D. — the said E. F. demised the said [out-house] in which, &c. in the said [second] plea mentioned, amongst other things to the said plaintiff, to have and to hold the same to the said plaintiff from thenceforth for one whole year then next following, and so from year to year so long as they the said E. F. and plaintiff should respectively please. By virtue of which said demise, the said plaintiff afterwards, and before [\*1206] the said time when, &c. to wit, on the — day of — A. D. — aforesaid, entered into the said [out-house] in the said [second] plea mentioned, in which, &c. with the appurtenances, and became and was thereof possessed, and being so possessed, and the said E. F. being still living, to wit, at, &c. (*venue*) aforesaid, the said plaintiff continued so possessed of the said [out-house] in the said [second] plea mentioned, under and by virtue of the said demise, from thence until the said defendant during the continuance of the said tenancy, to wit, at the said time when, &c. of his own wrong, broke and entered the said [out-house] in which, &c. in the said [second] plea mentioned, and the said defendant unlawfully became possessed thereof, and the said defendant unlawfully committed the said trespasses in the introductory part of the said [second] plea mentioned, in manner and form as the said plaintiff hath above thereof complained against the said defendant. And this, &c.—[*Conclude with a verification, as ante, 1201.*]

[*Precludi non, as ante, 1201.*]—Because he saith, that the said close, in the said [second] plea mentioned, before and at the said time when, &c. did lie, still doth lie, contiguous and next adjoining to a certain common and public king's highway, in the parish aforesaid, and that the said defendant and all other the tenants and occupiers of the said close in which, &c. with the appurtenances, for the time being, from time, &c. have state the obligation to repair, and the defect of fences, and that the plaintiff's cattle being driven (k) along the way thereby escaped into the close, as ante, 1103, and then proceed as follows:—and remained and continued in the said close in which, &c. until the said defendant at the said time when, &c. in the said [first] count mentioned and before the said plaintiff could drive the said cattle from and out of the said close in which, &c. of his own wrong, seized, took, and drove away the said cattle, and impounded the same, and kept and detained the same so impounded in the said space of time in the said [first] count mentioned. And this, &c.—[*Conclude with a verification, as ante, 1201.*]

To a plea  
of distress  
damage  
feasant,  
defect of  
fences (i).  
[\*1207]

[*Precludi non, as ante, 1201.*]—Because he saith, that after the taking and impounding the said cattle in the said declaration mentioned by the said defendant in the name of a distress, in manner and form as the said defendant hath in his said [second] plea in that behalf above alleged, to wit, on, &c. aforesaid, at, &c. (*venue*) aforesaid, the said defendant converted and disposed of the said cattle to his own use, in manner and form as the said plaintiff hath above thereof complained against the said defendant. And this, &c.—[*Conclude with a verification, as ante, 1201.*]

To a plea  
of distress  
damage  
feasant,  
that defend-  
ant con-  
verted dis-  
tress to his  
own use  
(i)

(f) See a form, Morg. 639, and see ante,

(j) See the form, 3 Wils. 20; and see 4 T. R. 364.—1 Stark. C. N. P. 178.

(k) 2 Hen. Bla. 527.—Dyer, 385.

II. TO  
PERSONAL  
PROPERTY.  
Replica-  
tion to a  
justifica-  
tion under  
a writ of  
*fieri facias*  
ante, 1182,  
that a writ  
of error  
was allow-  
ed before  
the levy  
under the  
execution.

[\*1208]

[*First plea, special similiter to plea of general issue, second plea as follows*]:—And as to the plea of the said defendant, by him [secondly] above pleaded as to the several trespasses in the introductory part of that plea mentioned, and therein attempted to be justified, the said plaintiff says, [*Precludi non, as ante, 1201*] because he says, that after the recovery of the said judgment which the same writ of *fieri facias* was founded upon and issued, and before the issuing of the said writ of *fieri facias*, in the said [second] plea mentioned, and the levying of execution as aforesaid, to wit, on, &c. a certain writ of error of our said lord the king \*was duly issued out of Chancery, directed, &c. commanding him, &c. [*Here set out the writ of error in the past tense*] as by the said writ of error now remaining with the proper officer of the court of our said lord the king, before the king himself, in that behalf, not yet returned by the said officer, more fully appears; which said writ of error afterwards, and before the said time when, &c. to wit, on, &c. was duly allowed, according to the course and practice of the said court, and at the said time when, &c. was in full force and effect, and was a supersedeas to the said writ of *fieri facias*, upon the said judgment, and wholly superseded the execution of the said writ of *fieri facias*; and that afterwards, and before the said time when, &c. to wit, on, &c. at, &c. (*venue*) aforesaid, the said plaintiff duly gave notice to the said defendant, and to the said other defendants, of the said writ of error, and of the said allowance thereof, and then and there duly required by the said defendant, and the said other defendants, to cease to execute the said writ of *fieri facias*, but that the said defendant and the said other defendants, then and there wholly neglected and refused to comply with the said request; and after they so had notice of the said writ of error, and the said allowance thereof as aforesaid, committed the said several trespasses in the introductory part of the said [second] plea mentioned, in manner and form as the said plaintiff has above thereof complained against him. And this, &c.—[*Conclude with a verification, as ante, 1201.*]

III. TO  
REAL  
PROPERTY.  
To *liberum*  
*tenementum*, denial  
of plea  
(n).

[\*1209]

[*Precludi non, as ante, 1201.*].—Because he saith, that the said [close] in the said declaration mentioned, in which, &c. \*now is, and at the said several times when, &c. was the [close, soil and freehold of the said plaintiff, (n), and] not the close, soil, and freehold of the said defendant in

(n) If the plaintiff has been in possession twenty years adversely, this is a good plea, 2 Taunt. 157. When the name of the close, or the abutments thereof, have been set forth in the declaration, with such certainty as to preclude the possibility of the defendant's having another close of the same name, or abutments in the same parish, the above replication will suffice. This replication must conclude to the country, 2 Lutw. 1401.—Com. Dig. Pleader, 8 M. 34.—11 East, 70, 71; and Id. n. a. If the plaintiff claim, as tenant, &c. under the defendant, the plea must be special, as in the following form. When the close is not set forth with name or abutments, and there is any

reason to apprehend that the defendant may be able to prove that he was seised of any close in the same parish, it is necessary to new assign, setting out the name and abutments in the form, post, 1216. See 1 Saund. 299 b, c; but not so if the close be named in the declaration, 2 D. & R. 719.—1 B. & C. 489, S. C.—Ante, vol. i. Index, "*Libertum Tenementum*."

(n) This allegation is not necessary; it is sufficient to traverse the close being the defendant's, and where, in fact, the *locus in quo* was not the plaintiff's freehold, this allegation should be omitted. *Sed quare*, Com. Dig. Pleader, 8 M. 34.

III. TO  
REAL  
PROPERTY.

manner and form as the said defendant hath above in his said [second] plea alleged. And this the plaintiff prays may be inquired of by the country, &c.

[*Precludi non, as ante, 1021.*]—Because he saith, that whilst the said [dwelling-house] was the [dwelling-house] and freehold of the said defendant, and before the said time when, &c. to wit, on, &c. [*day of demise*] at, &c. (*venue*) aforesaid, the said defendant demised the said [dwelling-house] with the appurtenances, to the said plaintiff, to have and to hold the same to the said plaintiff for and during and unto the full end and term of one year from thence next ensuing, and fully to be complete and ended, and so from year to year, for so long time as they the said plaintiff and defendant should respectively please [or if the demise be under an indenture of lease *then set forth the lease and habendum, as ante, 574*]; by virtue of which said demise, the said plaintiff afterwards, and before the said time when, &c. entered into the said [dwelling-house] and became and was possessed thereof, and continued so thereof possessed from thence, until the said defendant afterwards, and during the continuance of the said demise, to wit, at the said time when, &c. of his own wrong, broke and entered the said [dwelling-house] and committed the said several trespasses in the introductory part of the said [second] plea mentioned, in manner and form as the said plaintiff hath above thereof complained against the said defendant. And this, &c.—[*Conclude with a verification, as ante, 1201.*]

To *liberum tenementum*, demise by defendant to plaintiff (o).

[*Precludi non, as ante, 1201.*]—Because he saith, that the said defendant, at the said time when, &c. of his own wrong, and without the leave and license of the said plaintiff to the said defendant, first given and granted in that behalf, committed the said several trespasses in the introductory part of the said second plea mentioned, in manner and form as the said plaintiff hath above thereof complained against him the said defendant. And this the said plaintiff prays may be inquired of by the country, &c.

To a plea of license, denial of license (p).

[\*1210]

[*Precludi non as ante, 1201.*]—Because, protesting that the said supposed license, if any such ever were given, was obtained by a false and fraudulent representation of and by the said defendant, for replication, nevertheless, in this behalf, the said plaintiff saith, that before the said time when, &c. in the said declaration mentioned, to wit, on, &c. at, &c. (*venue*) the said supposed license was revoked, recalled, and countermanded by the said plaintiff. And this, &c. whereof, &c.

Replication to a plea of license, a countermand (q).

(o) In trespass for assaulting and imprisoning of plaintiff, the defendants pleaded that plaintiff was trespassing on defendant's close. The plaintiff replied, that the defendants had nothing in the close, except under R. N. C.; that before the time when, &c. and before defendants had anything in the close, R. N. C. demised it from year to year to W. C.; that W. C. permitted plaintiff to plant a crop of wheat, on condition that W. C. should have the half of the crop, and plaintiff the other; and that plaintiff entered to cut his teasles, when defendants assaulted him. It was held, that the replication was a sufficient answer to

the plea, although it did not allege that W. C.'s interest in the land was continuing when plaintiff entered to cut the teasles, 4 Bing. 202; and see the forms of replication there.

(p) See forms, 9 Wentw. 24.—Plead A. 491. No new assignment seems necessary, 11 East, 451.—2 Cro. 87.—Com. Dig. Pleader, R. 5. When a new assignment is advisable, 3 Campb. 516. See a replication of excess, *Id.*—Ante, 1205.

(q) See the notes to the above form. *Quare*, if the last form would not suffice, 11 East, 451.

III. TO  
REAL PROP-  
ERTY.

To a plea  
of escape  
through  
defect of  
fences,  
that defen-  
dant turn-  
ed the cat-  
tle into *lo-  
cus in quo*  
(*r*).

To a plea  
of escape  
through  
defect of  
fences,  
that defen-  
dant's cat-  
tle were  
unruly,  
&c.

[\*1211]

Traverse  
(*t*).

[*Precludi non, as ante, 1101.*]—Because he saith, that just before the said time when, &c. the said cattle in the said declaration mentioned, were wrongfully turned and driven by the said defendant, from and out of the said highway into and upon the said close, or piece or parcel of land in which, &c. and upon that occasion, and by means and in consequence thereof, the said cattle were, at the said first time when, &c. in the said close in which, &c. depasturing on the grass there then growing, and doing damage there, in manner and form as the said plaintiff hath above there-of complained against him the said defendant. And this, &c.—[*Conclude with a verification, as ante, 1201.*]

[*Precludi non, as ante, 1201.*]—Because he saith, that the said banks, mounds, and fences, between the said closes of the said defendant and the said close, or piece or parcel of land of the said plaintiff, before and at the said several times when, &c. in the said plea of the said defendant, and in the said declaration above respectively mentioned, at, &c. aforesaid, were (*s*) well and sufficiently maintained and repaired to prevent cattle feeding and being in the said close of the said defendant, from escaping from and out of the same into the said closes of the said plaintiff, and that the said cattle of the said defendant, in the said second plea mentioned, at the said several times when, &c. were wild, ungovernable, and unruly, and used to break down banks, mounds, and fences in good repair, and that the said cattle of the said defendant, at the said several times when, &c. at, &c. (*venue*) aforesaid, through their said wild, ungovernable, and unruly disposition, broke down the said mounds, banks, and fences, between the said close of him the said plaintiff, and the said close of the said defendant, the same then being well and sufficiently maintained and in good repair as aforesaid, and through the breach of the said banks, mounds, and fences so made by the said cattle of the said defendant as aforesaid, the said cattle, at the said several times when, &c. entered into the said close of the said plaintiff and eat up the grass and herbage of the said plaintiff then growing there, and did damage there, in manner and form as the said defendant hath above, in his said [second] plea in that behalf alleged; without this, that the said cattle so being in the said close, or piece or parcel of land of the said plaintiff as aforesaid, a little before the said several times when, &c. in the said [second] plea mentioned, and against the will of the said defendant, and without his knowledge or consent escaped from the said close, or piece or parcel of land of the said defendant, through the defects and insufficiency of the said banks, mounds, and fences, between the said close of the said defendant, and the said close, or piece or parcel of land of the said plaintiff, as the said defendant hath above in his said second plea in that behalf alleged. And this, &c.—[*Conclude with a verification, as ante, 1201.*]

Observa-  
tions on  
traverses.

*From the case in 7 B. & C. 346, it will appear, that where the right of common or way, as stated by the defendant, is denied by the plaintiff, it*

(*r*) *Quare* the necessity for a traverse, see the next form.

(*s*) Or, instead of this allegation, say “were in good and sufficient repair to pre-

vent cattle from escaping from the said com-  
mon or waste into the said close called, &c.”

(*t*) *Quare*, as to this traverse.

is in general sufficient merely to deny such right, as in the above form, following the language of the plea, and concluding to the country. This rule has been most ably deduced from the cases in the books by Mr. Sergeant Williams, 1 Saund. 103 b, where he states, "that courts of justice discourage unnecessary prolixities in pleading, because they tend to expense and delay, and that, therefore, where a defendant cannot take any new or other issue in his rejoinder than the matter he had pleaded before, without a departure from his plea, or where the issue on the rejoinder would be the same in substance as on the plea, then the plaintiff ought to conclude to the country; as where the plea states a defect of fences, a prescription for a right of common or way, &c. in which the better and shorter method is directly to deny the fact of defect of fences, prescription, and the like, without a formal traverse, and conclude to the country."—1 Saund. 103 b.—1 Lord Raym. 641.—In denial of the prescriptive right of way, &c. the replication will be similar to the last form, except in the part in italics, which must necessarily be according to the facts and the language of the plea.

III. TO REAL PROPERTY.

of rights of common and ways in general.

\* See a form of replication to a plea of right of way, showing a stoppage up under Highway Act, 1 Marsh. 261. [\*1212]

## \*NEW ASSIGNMENTS.

[\*1213]

[*Precludi non, as ante, 1145.*—Because he saith, that he exhibited his said bill against the said defendant, and brought his suit thereupon, [or, if in C. P. or by original, "issued his writ and declared thereupon,"] not for the non-performance of the said promises and undertakings in the said plea of the said defendant mentioned, and in respect whereof the said judgment therein also mentioned was so recovered as aforesaid, but for the non-performance, of other and different promises and undertakings made by the said defendant to the said plaintiff, in manner and form as the said plaintiff hath above thereof complained against the said defendant. And this the said plaintiff is ready to verify; wherefore, inasmuch as the said defendant hath not answered the said

IN ASSUMPSIT.

To plea of judgment recovered, new assignment that the action was brought for breaches of contracts different to those mentioned in the plea (a).

(a) See the forms, 8 Wentw. 151 to 158, and a form of a replication, ante, 1158.—6 T. R. 607.—3 Wils. 804.—3 B. & C. 235. The form in 8 Wentw. appears too prolix.—In 3 Lev. 92, it was held, that to a justification in trespass, concluding with a statement that the trespasses mentioned in the plea were those mentioned in the declaration, the plaintiff could not reply that they were not the same, without showing some other trespass; and this seems proper, in order that the defendant may have an opportunity of pleading to the new assignment; see also another form, 4 T. R. 146, and the plea to this new assignment, 3 Wentw. 146; and as to new assignments in

general, 2 Saund. 299, note 6.—Ante, vol. I. Index, "New Assignment." From the case in 1 Esp. Rep. 552, it appears, that whenever the plaintiff has in truth recovered a judgment for a cause of action similar to that mentioned in the declaration, and the defendant pleads such a recovery in bar, a new assignment is necessary; so it may be necessary in some cases where the defendant has pleaded partnership in abatement. But, according to the cases in 3 B. & Cren. 285.—6 T. R. 607.—3 Wils. 804, it should seem that the plaintiff may take issue on the fact of the promises being the same, by a replication denying it.

**L. IN TREES—  
PASS TO  
PERSONS.**

complaint of the said plaintiff, as to the said breach and non-performance of the said promises and undertakings in the said declaration mentioned, and so newly above assigned as aforesaid, he the said plaintiff prays judgment, and his damages, by reason of the non-performance thereof, to be adjudged to him, &c.

To plea of  
son assault  
demesne,  
new as-  
signment  
that the  
action was  
brought  
for a differ-  
ent assault  
(b).

[\*1214]

Conclu-  
sion.

[*Precludi non, as ante, 1201.*—Because he saith, that he the said plaintiff exhibited his said bill against the said defendant, and brought his suit thereupon, [or, *if in C. P. or by original, say* “issued his writ in this suit, and declaration thereupon,”] not for the trespasses in the introductory part of the [second] plea mentioned, but for that the said defendant on the said — day of — A. D. — with force and arms, &c. at, &c. (*venue*) aforesaid, upon another and different occasion, and for another and different purpose than in the said plea mentioned, made another and different assault upon the said plaintiff than the said assault in the said [second] plea mentioned, and then and there beat, bruised, wounded, and ill-treated (c) the said plaintiff, in manner and form as the said plaintiff hath above thereof complained against the said defendant, and which said trespasses above newly assigned are other and different trespasses than the said trespasses in the said [second] plea mentioned. And this the said plaintiff is ready to verify, wherefore inasmuch as the said defendant hath not answered the said trespasses above newly assigned, the said plaintiff prays judgment, and his damages by him sustained, on occasion of the committing thereof to be adjudged to him, &c.

To justifi-  
cation un-  
der pro-  
cess, now  
assign-  
ment of an  
imprison-  
ment be-  
fore issu-  
ing of pro-  
cess (d).

[\*1215]

[*De injuria absque residuo, &c. as ante, 1204, but admitting the writ and warrant, and new assignment as follows:*—And the said plaintiff further saith, that he exhibited his said bill against the said defendant, and brought his suit thereupon, [or, *if in C. P. or by original, “issued his writ in this suit, and declared thereupon,”*] not only for the said assaulting the said plaintiff, in the said [first] count of the said declaration mentioned, and imprisoning him, and keeping and detaining him in prison for the said space of one day, part of the said time in the said [first] count mentioned, but also for that the said defendant, on the said — day of — A. D. — before the issuing of the said writ in the said [last] plea mentioned, and on another and different occasion than by virtue of the said writ, or in execution thereof, made an assault upon the said plaintiff to wit, at, &c. (*venue*) aforesaid, and then and there beat, bruised, wounded, and ill-treated him, and then and there imprisoned the said plaintiff and kept and detained him in prison there, without any reasonable or probable cause whatsoever, for a long space of time, to wit, “for the space of [one day,] residue of the said time in the said [first] count mentioned contrary to the laws and customs of this realm, and against the will of the said plaintiff, which said assault and imprisonment above newly assigned is an-

(b) See the forms, ante, 9 Wentw. 10.—Index, cxxiv. When this new assignment is proper, and when not, see 10 East, 81, in notes.—16 Id. 82.—1 Saund. 299, n. 6, 2 T. R. 172 to 177.—Ante, vol. i. Index, “*New Assignment.*”

(c) This statement must correspond with the averments in the declaration. It would seem sufficient to say, “*committed the said several trespasses in the said declaration men-*

*tioned.*”

(d) See the forms, 9 Wentw. Index, cxxiv. As to new assignments in general, and when this is necessary, see 2 Wils. 3.—10 East, 81, 78, 76.—16 Id. 82. 4 Taunt. 98.—See 1 Saund. 299, note 6. 2 T. R. 172 to 177.—Ante, vol. i. Index, “*New Assignment.*” See replication of wrongful detainer after discharge by the plaintiff, 2 T. R. 172.

other and different assault and imprisonment then the said assault and imprisonment in the said [last] plea mentioned, and thereby attempted to be justified. Wherefore, &c.—[*Conclude as in the preceding form.*]

TO  
PERSONS.

[*Precludi non, as ante, 1201.*—Because he saith, that he exhibited his said bill against the said defendant, and brought his suit thereupon, [or, if in *C. P.* or by original, say, “he sued out his original writ in this cause, and brought his said suit thereupon”] against the said defendant, not only for the said trespasses in the said [second and last] pleas respectively mentioned, and thereby attempted to be justified, but also for that the said defendant, on the — day of — A. D. out of the said pretended ways in those pleas mentioned, or either of them, [seized (f)] and took the said cart in the declaration mentioned, and drew the said staple, and broke, damaged, and spoiled the same; and also the said padlock with which the said cart was fixed and fastened to a certain post, out of the said supposed way, and removed the said cart, and seized, took, and carried away the same and converted and disposed thereof to his own use (f),] in manner and form as the said plaintiff hath above thereof complained against him; which said trespasses above newly assigned, are other and different trespasses from the said trespasses in the said [second and last] pleas mentioned, and thereby attempted to be justified. Wherefore, &c.—[*Conclude as ante, 1214.*]

II. IN TRESPASS TO PERSONAL PROPERTY. To plea justifying removal of cart, &c. under a right of way, new assigning *extra viam* (e).

And as to so much of the said last-mentioned plea of the said defendant as relates to the seizing, taking (h), and carrying away of the said goods and chattels in the said last count of the said declaration mentioned, except the said hay and grass, parcel of the same goods and chattels, and converting and disposing thereof to his own use; the said plaintiff saith, that the wheat, rye, barley, peas, and oats, in the last count of the said declaration mentioned, were certain quantities of wheat, rye, barley, peas, and oats of the said plaintiff, which grew in the said close called — and which, before the committing of the said trespasses in “the said last count of the said declaration mentioned, were cut down and reaped by the said plaintiff, and were other than and different from the said corn in the said [fifth] count of the said declaration mentioned, and no part of the said goods and chattels in the said last plea of the said defendant mentioned. And this the said plaintiff is ready to verify. Wherefore, &c.—[*Conclude as ante, 1213.*]

NEW ASSIGNMENT that the corn, &c. was different corn to that mentioned in the plea (g).

[\*1216]

[*Precludi non, as ante, 1201.*—Because he saith, that the said piece or parcel of land in which, &c. in the said “first count of the said declaration mentioned, at the said several times when, &c. was and is a certain close, in the parish aforesaid, called —, abutting, &c. [*state the abutments,*

III. IN TRESPASS TO REAL PROPERTY.

To a plea [\*1217]

(e) See the form and law referred to in the note, ante, 1213, and 10 East, 73.

(f) These statements must agree with the statements in the declaration.

(g) See Plead. A. 414, 415.—10 East, 76.

(h) All the statements in this new assignment must of course depend on those in the declaration.

III. IN  
TRESPASS  
TO REAL  
PROPERTY.

of *liberum  
tenementum*, new  
assign-  
ment set-  
ting out  
abutals (†)

as *ante*, 868,] which said close now is, and at the said several times when, &c. was another and different close from the said close in the said last plea of the said defendant mentioned, and therein alleged to be the close, soil, and freehold of the said defendant. And this he the said plaintiff is ready to verify; wherefore inasmuch as the said defendant hath not answered the said trespasses by him committed in the said close in which, &c. above newly assigned, the said plaintiff prays judgment and his damages, on occasion of the committing of the said trespasses above newly assigned, to be adjudged to him, &c.

New as-  
signment  
of abutals  
towards a  
place.

[*Precludi non, &c. as ante*, 1201.]—Because he saith, that the said close in which, &c. in the said declaration secondly mentioned, at the said several times when, &c. was and is a certain close in the parish aforesaid, abutting in part towards the north, on a certain [ancient ditch or watercourse,] towards the west, on a certain [pond or water-course,] towards the south towards a certain [other close and messuage of the said plaintiff,] and towards the east, on [the river Thames,] which said mentioned close now is, and at the said several times when, &c. was another and different close from the said close in the said [last] plea of the said defendant mentioned, and therein alleged to be the said close, soil, and freehold of the said defendant. And this, &c.—[*Conclude as in the last preceding form.*]

To a plea  
of right of

[*To the end of the replication, traversing the right of way, &c.*

(†) See the forms, *East. Ext.* 608.—2 Rep. 18 b.—9 Wentw. 187, 192, and *Id. Index*, cxxiv. Whenever the declaration does not state the name or abutals of the close, &c. and the defendant pleads *liberum tenementum*, if there be the least reason to apprehend that the defendant is entitled to any other close in the same parish, &c. a new assignment is necessary; see 1 Saund. 299 b. c. &c. n. 6.—*Ante*, 1208.—Vol. i. *Index*, "*New Assignment.*"—When not necessary, see 1 B. & C. 489.—2 D. & R. 714, 8. C. Upon an objection that a close intervened between the description of the abutals on the south, the following observations were made:—Every abuttal of the close in which the trespass is charged, which is set out in the declaration in an action of trespass *quare clausum fregit*, must be proved with some degree of exactness, 2 Rol. Ab. 677. *Howell v. Sands*, Bul. N. P. 89.—1 T. R. 479.—1 Taunt. 496, and Dy. 161. But it is not necessary that an abuttal should be proved precisely as it is set out in the declaration; thus it was considered in *Howell v. Sands*, 2 Rol. Abr. 688, that if the trespass charged in the declaration, be alleged in the close abutting towards the south upon a windmill, it is sufficient to prove that there is a wind-mill towards the south of the close, although it likewise came out in evidence that there is an highway between the close and the wind-mill; this authority proves that it is sufficient to state and prove that the *locus in quo* towards

the south, pointed or was towards such a particular specified place. Every information respecting the situation of the *locus in quo*, conveyed by such a statement. The allegation that it was upon and next adjoining any particular spot, is superfluous, and the case of *Howell v. Sands*, strongly shows it, for if, notwithstanding the statement that the *locus in quo* was upon such a spot, it is not necessary to show that it immediately adjoins it, a fortiori the proof is not necessary where no such statement was made. If the trespass be charged in a close abutting on a close called A, towards the east, and it be proved that the situation of the close called A. is towards the north of the *locus in quo*, yet if it be likewise proved that it is a point or two towards the east thereof, this is sufficient proof of the abuttal. *Mildmay v. Dean*, 2 Rol. Abr. 678.—These authorities are founded upon the principle, that a strictness of allegation and proof of abutals is not required, if the general description of the place be designated, if it be shown to point, however slightly, towards the place specified, it is sufficient; and the court will not suffer the defendant to defeat the plaintiff on the ground that the place is not named with a particularity and scrupulous precision which could hardly ever be acted upon; see also *Bac. Abr. Trespass, B.* vol. vi. 624. For a replication of excess to a plea of license to break into a wall, see 3 Campb. 616.



*if intended to be traversed, and then assign as follows :]*—And the said plaintiff further saith, that he exhibited the bill against the said defendant, and brought his said action thereupon, not only for the several trespasses in the "introductory part of the said [second] plea mentioned, and therein attempted to be justified, but also that the said defendant on "the said several days and times in the said declaration mentioned with force and arms, &c. on the other and different occasions than those in the said plea mentioned, and in a greater degree, and to a greater extent, and with more force and violence than was necessary for abating and removing the said supposed stoppages and obstructions in the said plea mentioned, and for opening the said supposed way there, committed the said several trespasses in the introductory part of the said second plea mentioned; and also for that the said defendant on the said several days and times in the said declaration mentioned, with force and arms, &c. broke and entered the said close of the said plaintiff in the said declaration mentioned, and with his feet in walking (*m*), trod down, trampled upon, consumed, and spoiled the grass and herbage of the said plaintiff there growing, of great value, to wit, of the value aforesaid, on other and different occasions, and for other and different purposes than in the said [second] plea mentioned, and in other and different parts of the said close, out of the said way in that plea mentioned, in manner and form as the said plaintiff hath above thereof complained against him the said defendant, which said trespasses above newly assigned are other and different trespasses than the said trespasses in the said [second] plea mentioned, and therein attempted to be justified; wherefore, inasmuch as the said defendant hath not answered the said trespasses above newly assigned, he the said plaintiff prays judgment and his damages by him sustained, on occasion of the committing thereof to be adjudged to him, &c.

III. IN  
TRESPASS  
TO REAL  
PROPERTY.

way trav-  
erse of  
right of  
way, and  
new as-  
signment  
unneces-  
sary dam-  
age and  
extravium  
&c. (*k*).

Unneces-  
sary dam-  
age (*l*).

Extra  
viam.

And as to the said plea of the said defendant by him [secondly] above pleaded, the said plaintiff saith, that the said plaintiff, by reason of any thing by the said defendant in that plea alleged, ought not to be barred from having or maintaining his aforesaid action thereof against the said defendant, because he saith, that he exhibited his bill against the said defendant, and brought his suit thereupon, [or, *if in C. P. or by original writ* "issued his writ in this suit, and declared thereupon,"] not for the said several trespasses in the introductory part of the said [second] plea mentioned, but for the said defendant, on, &c. [*as in the preceding form, from the asterisk to the end.*]

The like  
merely  
new as-  
signing  
(*n*).

(*k*) See forms, 9 Wentw. Ind. cxxiv. and the law, 1 Saund. 299, 300, note 6.—10 East, 38, 76.—9 Wentw. 238.—Ante, vol. i. Index, "New Assignment." If in fact there were a right of way, but the plaintiff proceeds for a different trespass he should not traverse the

plea, but merely new assign, as in the next form.

(*l*) Proof of, see 7 B. & C. 846.

(*m*) These statements must correspond with those in the declaration.

(*n*) See 4 Taunt. 96.

## \*REJOINDERS IN GENERAL.

IN GENERAL. *In the K. B. (or "C. P.")* — Term, — Wil. 4.

1st. *Similar, to replication concluding to the country.* C. D. } And the said defendant as to the said replication of the said  
 ats. } plaintiff to the said [second] plea of the said defendant, and which  
 A. B. } the said plaintiff hath prayed may be inquired of by the country, doth the  
 like.

2dly. Commencement of rejoinder to a special replication (a). And the said defendant, as to the said replication of the said plaintiff to the said [second] plea of the said defendant, saith, that the said plaintiff ought not, by reason of any thing by him in that replication alleged, to have or maintain his aforesaid action thereof against him the said defendant, because he saith that, &c. [*here state the subject-matter of the rejoinder, and if it deny the replication, conclude thus:*]—And of this the said defendant puts himself upon the country, &c.

3dly. Conclusion to the country. And the said defendant is ready to verify, wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against the said defendant.

4thly. Conclusion with a verification.

[\*1220]

## \*REJOINDERS IN ASSUMPSIT.

USURY. And the said defendant, as to the said replication of the said plaintiffs to the [second] plea of the said defendant, saith, that the said plaintiffs ought not, by reason of any thing by them in that replication alleged, to have or maintain their aforesaid action thereof against him, because he saith, that the said plaintiffs, at the time the said bill was indorsed to them and at the time they discounted the same as aforesaid, had actual notice that the said bill had been drawn, accepted, indorsed, and given for the usurious and upon the usurious contract in the said plea to the said [first] count mentioned. And of this he the said defendant puts himself upon the country, &c.

to INSOLVENCY. And the said defendant, as to the said replication of the said plaintiff to the said [last] plea of the said defendant, says, [*actio non, as ante, 1219*] because as to so much of the said replication as relates to the said

Rejoinder (to replication of discharge un- (a) The commencement of the rejoinder sometimes is thus: "and the said defendant, as to the said plea of the said plaintiff by him above pleaded, by way of reply to the said defendant, by him secondly above pleaded in bar as to the said supposed trespasses in the introductory part of that plea mentioned says, &c." But this form seems to be unnecessarily prolix.

promissory note therein mentioned, the said defendant says, that although true it is that the said promissory note, in the said [first] count of the said declaration mentioned, was made and delivered to the said plaintiff by the said defendant after the said supposed adjudication; yet for rejoinder in this behalf he says, that the said promissory note was made and delivered in respect of a debt accrued due from the said defendant to the said plaintiff, before the making of the said promissory note, and before the said adjudication thereon in the said plea mentioned. And this the said defendant is ready to verify, wherefore he prays judgment, if the said plaintiff ought to have or maintain his aforesaid action thereof against the said defendant; and as to so much of the said plea as relates to the said sum of £— therein mentioned, the said defendant says, that the said sum of £— did not accrue after the said adjudication in the said plea mentioned. And of this the said defendant puts himself upon the country, &c.

TO IN-  
SOLVENCY.

der Insol-  
vent Act,  
ante, 1150)  
that the  
note was  
made on  
account of  
a debt con-  
tracted be-  
fore plain-  
tiff's dis-  
charge,  
and that  
the other  
money ac-  
crued be-  
fore the  
adjudica-  
tion.

[*Actio non, as ante, 1219.*—Because he saith, that the said meat, drink, washing, lodging, and other supposed necessities in the said [first and second] counts of the said declaration respectively mentioned to have been found and provided by the said plaintiff for the said defendant, and the said goods, wares, and merchandize, in the said [third and fourth] counts of the said declaration respectively mentioned to have been sold and delivered by the said plaintiff to the said defendant, were not necessary or suitable to the then degree, estate, and condition of him the said defendant, and that the said money in the said [sixth] count of the said declaration mentioned to have been paid, laid out, and expended by the said plaintiff, to and for the use and \*on the account of the said defendant, was not so paid, laid out, and expended by the said plaintiff in and about the purchase of such necessities, in manner and form as the said plaintiff hath above in his said replication to the said [second] plea of the said defendant in that behalf alleged. And of this the said defendant puts himself upon the country, &c.

TO  
INFANCY.

To a repli-  
cation to a  
plea of in-  
fancy, that  
goods, &c.  
were ne-  
cessaries,  
that they  
were not  
necessa-  
ries (a).

[\*1221]

[*Actio non, as ante, 1219.*—Because he saith, that the said defendant did not, after he attained the age of twenty-one years, and before the commencement of this suit, assent to, ratify, or confirm the said several promises and undertakings in the said declaration mentioned, or any or either of them, in manner and form as the said plaintiff hath above in his said replication in that behalf alleged. And of this the said defendant puts himself upon the country, &c.

To a repli-  
cation to a  
plea of in-  
fancy that  
defendant  
when he  
came of  
age con-  
firmed the  
promises,  
that he  
did not  
confirm  
them (b).

TO TENDER.

[*Actio non, as ante, 1219.*—Because he saith, that though true it is that the said defendant did make such promise and undertaking as to the said sum of £—, parcel, &c. before the exhibiting of the said bill of the said plaintiff, as in and by the said bill is alleged, yet the said defendant in fact saith, that he the said defendant did not, at any time before the issuing of the said writ of *latitat* as aforesaid, promise and undertake to pay the said plaintiff the said sum of £—, parcel, &c. in manner and form

To a repli-  
cation of  
*latitat* be-  
fore the  
tender,  
that plain-  
tiff had no  
cause of

(a) See form, Lil. Ent. 107.—1 Rich. C. P. (b) As to this rejoinder, and the evidence, 158.—Morg. 223. See replication, ante, see 1 T. R. 648. 1146.

TO TENDER as the said plaintiff hath above in his said replication in that behalf alleged. And of this the said defendant puts himself upon the country, &c.

action at the time of issuing the writ (c).

To a replication of a *latitat*, stating the time when it was really issued and tender before that time (d).

[\*1222]

[*Actio non, as ante*, 1219.]—Because he saith, that by the course and custom of the said court of our said lord the king here, a writ of *latitat*, sued out after the end of any Term, is supposed to have issued out of the said court here within the Term next preceding. And the said defendant further saith, that the said writ of *latitat*, in the said replication mentioned, was really and truly sued out of the said court here by the said plaintiff, after the [25th] day of [November] in the said replication mentioned, (being "the last day of [Michaelmas] Term, in the said — year of the reign of our said lord the king,") that is to say, on the [8th] day of [December] in that year, and on the day and year last aforesaid, was signed, according to the form of the Statute in such case made and provided,\* and that the said defendant, before the said writ of *latitat* was so really and truly sued out of the said court as aforesaid, to wit, on the said — day of — at, &c. (*venue*) aforesaid, did tender and offer to pay the said sum of £— parcel, &c. to the said plaintiff, in manner and form as he the said defendant hath in his said [second] plea in that behalf alleged. And this, &c.—[*Conclude with a verification, as ante*, 1219.]

The like of process out of the exchequer, and tender at a prior hour of the day.

[*Actio non, as ante*, 1219.]—Because he saith, that by the course and practice of this court, a bill exhibited in the same court by any person as debtor of our lord the king, after the commencement of any term, and before the end thereof may, when the process upon which the same is founded is returnable in the same Term, be stated and alleged to have been exhibited in any time in such Term after the cause of action upon which such bill is founded, is therein stated to have accrued, although in truth and in fact such bill was not exhibited at the time at which it was, so stated and alleged to have been exhibited, but at a prior or subsequent time; and the said defendant saith, that although the said declaration is intituled generally of this Term, and although it is stated and alleged in the introductory part thereof, that the said plaintiff came as a debtor before the barons of this Exchequer, on, &c. in this same Term, and complained by his bill against the said defendant as present in court the same day. Yet the said defendant saith, that the said bill was really and in truth exhibited by the said plaintiff against the said defendant after the — day of — that is to say, on, &c. in this said Term and not before. And the said defendant further says, that the said plaintiff commenced this action, and sued out of the said court here a certain writ of our said lord the king, called a *subpœna ad respondendum*, being the first pro-

(c) See the replications, ante, 1151 to 1156, and see the form and law, 1 Wils. 142.—2 Burr. 952.

(d) This rejoinder is, it should seem, only necessary where the replication states the issuing of the writ to have been on the *teste* thereof; and where the *real day* is stated in the replication, this special form seems unnecessary, at all events. If the tender were made on the same day of issuing the writ, but

before the issuing, see the next form. See the replication and notes, ante, 1156, and the form, 2 Burr. 952. A *copias ad respondendum* in C. P. 1 B. & P. 543.—2 Id. 235. Though it is laid down in Imp. K. B. 810, that if a tender be made on the day the bill is filed, it will not assist the defendant, yet according to the doctrine in 4 Campb. 197, this is not law.

case in this action against the said defendant to compel his appearance here- TO TENDER.  
 after the hour of ten o'clock in the morning of the — day of —  
 [in this same Term,] and then before the said commencement of this  
 suit, and before the exhibiting of the said bill, to wit, at the hour of nine  
 o'clock in the morning on the — day of — at, &c. (*venue*) aforesaid,  
 the said defendant was ready and willing, and then and there tendered, and  
 offered to pay to the said plaintiff the said sum of £— parcel, &c. in [\*1223]  
 manner and form as the said defendant hath above in his said second plea  
 in that behalf alleged. And this, &c.—[*Conclude with a verification, as*  
*ante*, 1219.]

[*Actio non, as ante*, 1219.]—Because he saith, that the said plaintiff To replica-  
 did not, after the time when the said supposed causes of action, in the said tion to plea  
 declaration mentioned, accrued, and before the said defendant tendered of tender  
 and offered to pay the said sum of £— parcel, &c. as the said defendant of a prior  
 hath in his said plea in that behalf alleged, demand the said sum of £— demand,  
 parcel, &c. of and from the said defendant, or request him to pay the no such  
 same, or any part thereof, in manner and form as the said plaintiff hath demand  
 above in his said replication in that behalf alleged. And of this the said (e).  
 defendant puts himself upon the country, &c.

[*Actio non, as ante*, 1219.]—Because he saith, that the said plaintiff did To replica-  
 not, after the making of the said tender in the said [last] plea mentioned, tion to plea  
 and before the exhibiting of the said bill, demand of or request the said of tender  
 defendant to pay to the said plaintiff the said sum of £— parcel, &c. in of a subse-  
 the said plea mentioned, in manner and form as the said plaintiff hath quent de-  
 above in his said replication in that behalf alleged. And of this the said mand (f).  
 defendant puts himself upon the country, &c.

[*Actio non, as ante*, 1219.]—Because he saith, that after the recovery TO SET-OFF.  
 of the said judgment, and before the exhibiting of the said bill of the said Rejoinder  
 plaintiff against the said defendant in this behalf, he the said plaintiff did to a repli-  
 not pay and satisfy to the said defendant the said sum of [£798] in form cation of  
 aforesaid recovered, or any part thereof, in manner and form as the said payment  
 plaintiff hath above in that behalf alleged. And of this the said defend- plea of set-  
 ant puts himself upon the country, &c. And as to the said replication of off to a  
 the said plaintiff to the residue of the said plea, of the said defendant by judgment  
 him, [secondly] above pleaded, and whereof he hath prayed may be in- recovered,  
 quired of by the country, doth the like. denying  
payment.

[*Actio non, as ante*, 1219.]—Because he saith, that the said deed of TO  
 release in the said [second] plea mentioned, was had and obtained fairly, RELEASE.  
 and not by the fraud or covin of the said defendant in manner and form as Rejoinder  
 the said plaintiff hath above in his said replication in that behalf alleged. that the  
 And of this the said defendant puts himself upon the country, &c. release  
was ob-  
tained  
fairly (g).

(e) If there was a tender at the time of the to the law, see 1 Esp. Rep. 1116.  
 for demand, then rejoin that tender. (g) See the replication, ante, 1158, and 3

(f) See the replication, ante, 1155, and Went. Index, xii and xiii.  
 the forms, 3 Wentw. 181.—3 Id. Index. As

TO STATUTE  
OF LIMITATIONS.

Rejoinder that the action did not accrue within six years of issuing the writ (h).

[\*1224]

To replication of a writ, showing the time when it was issued, and non assumpsit infra sex annos of that time (i). Rejoinder denying record of original writ.

Traverse of the intent of issuing the writ (l).

To replication that defendant was beyond sea, &c. that plaintiff did not exhibit his bill within six years of defendant's first return (m).

[\*1225]

Rejoinder (to replication to plea of Statute of Limitations in an action by executors, of the action being

[*Actio non, as ante, 1219.*—Because he saith, that the said several supposed causes of action in the said declaration mentioned, did not, nor did any or either of them "accrue to the said plaintiff within six years, next before the issuing of the said precept, [or "writ," in the said replication to the said [second] plea mentioned, in manner and form as the said plaintiff hath above in his said replication in that behalf alleged. And of this the said defendant puts himself upon the country, &c.

[*Same as the form, ante, 1221, to the asterisk, and then proceed as follows:*—And the said defendant further saith, that he did not undertake or promise, in manner and form as the said plaintiff hath above thereof complained against him at any time within six years next before the said writ was so really and in truth issued as aforesaid. And this, &c. (k).—[*Conclude with a verification, as ante, 1219.*]

[*Actio non, as ante, 1219.*—Because he saith, that there is not any record of the said supposed original writ, and return thereof remaining in the said court of our said lord the king before the king himself, at Westminster, in manner and form as the said plaintiff hath above in his said replication alleged. And this, &c.—[*Conclude with a verification, as ante, 1219.*]

[*Actio non, as ante, 1219.*—Because he saith, that the said writ in the said replication mentioned, was issued by the said plaintiff, with intent to attack the said defendant by pledges, and then to enter and record his appearance in the said court here, and upon such appearance so recorded and entered, according to the custom of the said court here, to declare against him the said defendant, in a certain plea of debt upon demand for the sum of £—. Without this, that the said original writ was issued with intent that the said plaintiff, upon the appearance of the said defendant, should declare against the said defendant in manner and form as he the said plaintiff hath above alleged. And this, &c.—[*Conclude with a verification, as ante, 1219.*]

[*Actio non, as ante, 1219.*—Because he saith, that the said plaintiff did not exhibit his said bill against the said defendant, within six years next after his the said defendant's first return into this kingdom from beyond the seas, after the accruing of the said several causes of action unto the said plaintiff, in manner and form as the said plaintiff hath above in his said replication in that behalf alleged. \*And of this the said defendant puts himself upon the country, &c.

And the said defendant, as to the said replication of the said plaintiffs to the said [second] plea of the said defendant, says, that the said plaintiffs ought not, by reason of any thing by them in that replication alleged, to have or maintain their aforesaid action thereof against the said defendant, because he says, that the said defendant did not appear in the said

(h) See the replication, ante, 1160, and the forms, 8 Wentw. Index, xx. &c.

(i) See the replication, ante, 1160, and the forms and law, 2 Burr. 952.—Lil. Ent. 88.—8 Wentw. Index, xx

(k) Query if this ought not to conclude to

the country.

(l) See the form, 1 Lutw. 100, and 8 Wentw. Index, xx. If the issuing of the writ is denied, vide Sayer, 300.

(m) See the replication, ante, 1161, and the form, 1 Wentw. 327.

court in the said replication mentioned, to answer to the said J. H. according to the exigency of the said precept in the same replication mentioned, nor did the said J. H. thereupon exhibit his bill and declare against the said defendant, in manner and form as the said plaintiffs have above in the said last-mentioned replication alleged. And of this the said defendant puts himself upon the country.

TO STATUTE  
OF LIMITA-  
TIONS.

brought in  
a recent  
time after  
testator's  
death) that  
defendant  
did not ap-  
pear, nor  
did testa-  
tor declare  
in former  
suit (n).

[*Actio non, as ante*, 1219.]—Because he saith, that no goods or chattels of the said E. F. deceased, at the time of his death, have, since the exhibiting of the bill of the said plaintiff against him the said defendant in this behalf, come to or been in the hands of him the said defendant as administrator as aforesaid, to be administered, in manner and form as the said plaintiff hath in his said replication in that behalf alleged. And of this the said defendant puts himself upon the country, &c.

[*Actio non, as ante*, 1219.]—Because he saith, that the said judgment in the said [first] plea mentioned, was had and obtained for a true and just debt, really and truly due and owing to the said E. F. and not by the fraud or covin of the said defendant, or with intent to defraud the said plaintiff of his said debt, in manner and form as the said plaintiff hath above in his said replication in that behalf alleged; and the said defendant further saith, that the said judgment in the said [first] plea secondly mentioned, was, &c. (*similar denial to each judgment*.) And of this the said defendant puts himself upon the country, &c.

AGAINST  
EXECUTORS,  
&c.

To replica-  
tion that  
assets had  
come to  
hand since  
the exhibit-  
ing the  
bill, deny-  
ing the  
fact (o).  
To replica-  
tion that  
the judg-  
ments  
against the  
defendants  
were ob-  
tained by  
fraud, de-  
nying the  
fraud (p).

[\*1226]

ON AWARDS

To replica-  
tion stat-  
ing an  
award de-  
nying the  
award (a).

## \*REJOINDERS IN DEBT.

[*Similiter to the replication concluding to the country, as ante*, 1219.] And the said defendant, as to the said replication of the said plaintiff to the said [second] plea of the said defendant, saith, that the said plaintiff, by reason of any thing by him in that replication alleged, ought not to have or maintain his aforesaid action thereof against the said defendant, because he says, that the said E. F. and G. H. did not make any award of or concerning the said premises, in manner and form as the said plaintiff hath above in his said replication alleged. And of this the said plaintiff puts himself upon the country, &c.

[*Similiter to the replication concluding to the country, as ante*, 1219. *Commencement of rejoinder to special replication as ante*, 1219.]—Because he saith, that the inhabitants and parishioners of the said parish are not, nor were any or either of them, forced or obliged to expend the said sum of £— or any part thereof, for, in, or about the procuring

ON BASTAR-  
DY BONDS.

To replica-  
tion in  
debt on  
bastardy  
bond.

(a) See form of replication and note, ante, forms, 8 Wentw. Index, xxvi. &c.—1 Saund. 108, in the notes, and 384, note 9.

(e) See the form, ante, 1165. (a) See the replication and the law, ante,

(p) See the replication, ante, 1166, and the 1176.—11 East, 188.

ON BASTARDY BONDS.

showing damage, non damnificatus (b).

necessary food or nourishment for the said child, nor were the said inhabitants or parishioners, or any or either of them damnified, by reason or on account of the maintenance or bringing up of the said child, in manner and form as the said plaintiff hath above in his said replication in that behalf alleged. And of this the said defendant puts himself upon the country, &c.

ON INDEMNITY BOND.

To a replication to a bond conditioned for E. F. accounting, &c. that E. F. did account, &c. (c).

[\*1227]

[Commencement as ante, 1219.]—Because he saith, that the said E. F. after the making of the said writing obligatory, and after he had received the said monies in the said replication mentioned, and before the exhibiting of the said bill, [or, in C. P. or by original, “before the commencement of this suit,”] to wit, on, &c. at, &c. (venue) aforesaid, well and truly accounted for and paid the same sums of money received by the said E. F. as aforesaid. And of this the said defendant puts himself upon the country, &c.

[\*1228]

## \*REPLICATION IN REPLEVIN.

IN GENERAL. Similiter to plea in bar, concluding to the country.

Commencement of a replication in replevin.

Conclusion to the country.

Conclusion with verification (a).

In the K. B. (or, “C. P.”)

C. D. }

ats. }

A. B. }

And the said defendant, as to the said plea in bar of the said plaintiff by him [first] above pleaded. And which he hath prayed may be inquired of by the country, doth the like.

C. D. }

ats. }

A. B. }

And the said defendant, as to the said plea in bar of the said plaintiff to the said [first] avowry [or, “cognizance”] of the defendant, saith that he, by reason of any thing by the said plaintiff in that plea above alleged, ought not to be barred from avowing [or, “acknowledging,”] the taking of the said [cattle,] goods, and chattels in the said declaration mentioned, in the said place in which, &c. and justly, &c. because he saith, that, &c. [or, if the replication merely reassert matter alleged in the avowry or cognizance, say because “as before,” he saith, &c. Here state the subject-matter of the replication and if it be merely in denial of the plea in bar, conclude to the country as follows:] And of this the said defendant puts himself upon the country, &c.

And this the said defendant is ready to verify, wherefore, as before, he prays judgment, and a return of the said [cattle,] goods, and chattels together with his damages, &c. according to the form of the Statute in such case made and provided, to be adjudged to him, &c.

(b) See the replication, ante, 1177, and the forms of rejoinders, 7 Wentw. Index, 615.—5 Wentw. 581. If the defendant has pleaded non damnificatus, he cannot afterwards rejoin, that the parishioners were damnified of

their own wrong, for that would be a departure. 2 Saund. 80. 1 Hen. Bla. 253.—1 Saund. 118

(c) See the replication, ante, 1179, and the forms of rejoinders, 7 Wentw. Index, 616.

(a) As to this conclusion, see ante, 1043

— Term, — Wil. 4.



And the said defendant as to the said plea in bar of the said plaintiff as to the said sum of £— residue of the said rent in the said avowry [*or*, "cognizance"] mentioned, saith, that the said defendant, by reason of any thing by the said plaintiff therein alleged, ought not to be barred from avowing [*or* "acknowledging,"] the taking of the said [cattle.] goods, and chattels in the said declaration mentioned, in the said place in which, &c. and justly, &c. because he saith that the said plaintiff did not tender or offer to pay to the said defendant the said sum of £— of the rent aforesaid, in manner and form as the said plaintiff hath above in his said plea in bar alleged. And of this the said defendant puts himself upon the country, &c.

FOR RENT,  
&c.  
To plea in  
bar of a  
tender, de-  
nial of ten-  
der (b).  
[\*1229]

[*Commencement as in the above form.*]—Because he saith, that after the said, &c. (*the day when the rent became due, as stated in the avowry.*) and after the said supposed tender in that plea mentioned, and before the taking of the said goods and chattels, in the said place in which, &c. to wit, on, &c. aforesaid, at, &c. (*venue*) aforesaid, the said E. F. demanded of the said plaintiff the said sum of £— the residue of the said rent, and required him to pay the same to the said E. F. which the said plaintiff then and there wholly neglected and refused to do; wherefore the said defendant, as the bailiff of the said E. F. well acknowledges the taking of the said goods and chattels, in the said place in which, &c. and justly, &c. for and in the name of a distress for the said rent due, so due, in arrear, and unpaid to the said E. F. as aforesaid; and the said rent still remains so due and unpaid in manner and form as the said defendant hath above alleged. And this, &c. [*Conclude with a verification, as ante, 1228.*]

To a plea  
in bar of a  
tender to a  
cogniz-  
ance for  
rent, a sub-  
sequent  
demand  
(c).

[*Precludi non, as ante, 1228.*]—Because he saith, that the said defendant, after the making of the said demise in the said plea in bar mentioned, and whilst the said plaintiff was possessed of the said place in which, &c. under and by virtue of the said demise, as tenant thereof to the said defendant, and half a year before the — day of — A. D. to wit, on, &c. at, &c. (*venue*) gave due notice to, and then and there required the said plaintiff to quit and deliver up the possession of the said demised premises, with the appurtenances, unto the said defendant unto the said — day of — A. D. — then next following; and by means thereof, afterwards, and before the said time when, &c. to wit, on the day and year last aforesaid, the said tenancy, and the estate and interest of the said plaintiff in the said demised premises, and the said place in which, &c. with the appurtenances, wholly ended and determined, to wit, at, &c. (*venue*) aforesaid, and thereupon the said defendant, after the said tenancy was so ended and determined as aforesaid, and before the said time when, &c. to wit, on the — day of — in the same year, entered into the said place in which, &c. and then and there became, and was lawfully possessed thereof, and continued so possessed until the said time when, &c. and because the said cattle, after the said demise became and was so ended and determined as aforesaid, and whilst the

TO DAN-  
AGE FEAS-  
ANT.  
To a plea  
in bar of a  
demise  
from the  
defendant  
to the  
plaintiff,  
stating a  
notice to  
quit (d).  
[\*1230]

(b) See the plea in bar and notes, ante, 1191; and see the form, ante, 1221.

(c) See the plea in bar, ante, 1191; and as to replications of a subsequent demand, ante, 1155.

(d) See the plea in bar, ante, 1195, and 7 T. R. 431. As to the statement of a notice to quit, ante, 494. See replication to plea in bar, denying demise to plaintiff, held good, 1 D. & R. 42.—2 Saund. 319.

**TO DAMAGE  
TREASANT.** said defendant was so possessed as aforesaid, and at the said time when, &c. were wrongfully in the said place in which, &c. treading, &c.—[*Conclude with a verification, as ante, 1228.*]

**To a plea  
in bar of  
defect of  
fences, de-  
nial of de-  
fendant's  
obligation  
to repair  
(e).** [*Precludi non, as ante, 1228.*]—Because he saith, that he the said defendant, and all other the tenants and occupiers of the said close in which, &c. for the time being, from time whereof the memory of man is not to the contrary, have not repaired and amended, nor have been used and accustomed to repair and amend, nor of right ought to have repaired and amended, nor ought the said defendant, before or at the said several times when, &c. of right to have repaired and amended, nor still of right ought to repair and amend, the said hedge and fence between the said close of the said plaintiff, and the said close in which, &c. when, and as often as occasion hath required, to prevent cattle feeding and depasturing or being in the said close of the said plaintiff, from erring or escaping thereout, through the defects and insufficiency of the said hedge and fence, into the said close in which, &c. and doing damage there in manner and form as the said plaintiff hath above in his said plea in bar in that behalf alleged. And of this the said defendant puts himself upon the country, &c.

**The like  
denial of  
defect of  
fences.** [*Precludi non, as ante, 1228.*]—Because he saith, that the said hedge and fence in the said plea in bar mentioned, before or at the said time when, &c. were not ruinous, prostrate, or fallen down for want of needful or necessary making, repairing, or amending thereof, in manner and form as the said plaintiff hath above in his said plea in bar in that behalf alleged. And of this the said defendant put himself upon the country, &c.

[\*1232]

## \*REJOINDERS IN TRESPASS.

**IN  
GENERAL.**  
1. *Similiter*  
to replica-  
tion, con-  
cluding to  
the coun-  
try.

*In the K. B. (or "C. P." or, "Exchequer.")*

C. D. }

ats. }

A. B. }

plaintiff to the said [second] plea of the said defendant, as

which the said plaintiff hath prayed may be inquired of by the country

doth the like.

— Term, — Wil. 4.

2. Rejoin-  
der to a  
replication,  
concluding  
with aver-  
ification.

And the said defendant, as to the said replication of the said plaintiff to the said [third] plea of the said defendant, saith, that the said plaintiff ought not, by reason of any thing by him in that replication above alleged, to have or maintain his aforesaid action against the said defendant in respect of the said supposed trespasses in the introductory part of the

(e) See the pleas in bar, ante, 2196, 1210. the cattle were unruly, as ante, 1210, or the plaintiff turned the cattle in, as ante, 1210.—See 1 Taunt. 529.  
This replication should conclude to the country. 1 Saund. 108. The replication may be, that

said [third] plea and in the said declaration mentioned, because he saith, that, &c.—[*Here state the subject-matter of the rejoinder, and the conclusion to the country will be as follows:* ]—And of this the said defendant puts himself upon the country, &c.

IN  
GENERAL.  
3. Conclusion to the country.

And this the said defendant is ready to verify, wherefore, as before, he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against the said defendant, in respect of the said supposed trespasses in the introductory part of the said [third] plea, and in the said declaration mentioned, &c.

4. Conclusion with a verification.

[*Actio non, as supra.* ]—Because he saith, that he did not to a greater degree, or with more force or violence than was necessary for the said purpose in the said [last] plea mentioned, commit the said supposed trespasses, in the introductory part of the said [last] plea mentioned, in manner and form as the said plaintiff hath in his said replication in that behalf alleged. And of this the said defendant puts himself upon the country, &c.

TO PERSON.  
&c.  
Rejoinder to replication of excess, denying the illegal excess (a).

[*Actio non, ut supra.* ]—Because he saith, that the said defendant, after the making of the said demise, &c. [*state "the notice to quit, and the determination of the tenancy, precisely as in the form, ante, 1229, to the assessor, saying, "before either of the said times when, &c." instead of "the said time when, &c." and then proceed as follows:* ] and thereupon he the said defendant, after the said tenancy was so ended and determined as aforesaid, to wit, at the said several times when, &c. entered into the said [dwelling-house] in which, &c. and committed the said supposed trespasses in the introductory part of the said [second] plea mentioned, as he lawfully might for the cause aforesaid, to wit, at, &c. (*venue*) aforesaid. And this, &c.—[*Conclude with a verification, as ante, 1232.* ]

TO REAL  
PROPERTY.  
To a replication of a demise to the plaintiff a notice to quit. [\*1233]

[*Actio non, as ante, 1232.* ]—Because he says, that the said plaintiff, after the giving the notice in the said replication mentioned, to wit, on, &c. at, &c. (*venue*) waived, relinquished, and abandoned such notice, and then and there assented and agreed to the continuance of the said demise. And this, &c.—[*Conclude with a verification, as ante, 1232.* ]

Rejoinder in trespass that the notice to quit, was waived (b).

And the said C. D. as to the said replication of the said A. B. to the said second plea of him the said C. D., as before, saith, that he the said C. D. and all those whose estate he now hath, and at the said several times when, &c. had, of and in the said messuage and land, with the appurtenances, in the said second plea mentioned, for the time being, from time whereof the memory of man is not to the contrary, have had and have been used and accustomed to have, and of right ought to have had, and the said C. D. still of right ought to have for himself and themselves, his

Rejoinder re-asserting right of way, &c. as stated in the plea (c).

(a) See replication, ante, 1205.

(b) See the sur-rejoinder, post, 1235.

(c) We have seen that a replication, denying a right of way, or any other prescriptive right, or the obligation to repair, as stated in the plea, should conclude to the country, and

without a formal traverse, see ante, 1211, and 1 Saund. 108 b.—7 B. & C. 846. If the replication be improperly concluded with a formal traverse and verification, the rejoinder must re-assert the subject-matter of the plea, as in the above form.

TO REAL  
PROPERTY.

and their tenants and farmers, occupiers of the said messuage and land, with the appurtenances, common of pasture, in, upon, and throughout the said close in which, &c. for all his and their commonable cattle, *levant* and *couchant*, in and upon the said messuage and land, with the appurtenances, in every year, at all times of the year, as to the said messuage and land, with the appurtenances, belonging and appertaining, in manner and form as he the said C. D. hath in his said second plea above alleged. And of this he the said C. D. puts himself upon the country, &c.

Rejoinder.  
(to a replication that defendant's cattle were unruly, and broke the fence,) that the cattle escaped by the defect of fence mentioned in plea, and not through any breach of fence, as alleged in the replication (d)  
[\*1234]

[*Actio non, as ante, 1232.*]—Because he saith, that the said cattle of the said defendant escaped out of the said common or waste in the said [second] plea in that behalf mentioned, into the said close in which, &c. called, &c. through the defect of the said fences in the said [second] plea in that behalf mentioned, in manner and form as the said defendant hath above in his [second] plea in that behalf above alleged, and not through any breach of the said fence, as in the said replication to the said [second] plea mentioned. \*And this the said defendant prays may be inquired of by the country, &c.

## SUR-REJOINDER IN ASSUMPSIT.

Sur-rejoinder (to rejoinder to a replication to a plea of plaintiff's discharge under Insolvent Act) that the note was not made on account of a debt contracted before plaintiff's discharge (e).

A. B. }  
agst. } And the said plaintiff, as to the said rejoinder of the said defendant, as to so much of the said replication as relates to the said promissory note therein mentioned, says, that he, by reason of anything by the said defendant in that part of the said rejoinder above alleged, ought not to be barred from having and maintaining his aforesaid action thereof against him, because he says, that the said promissory note was not made and delivered in respect of a debt accrued due from the said defendant to the said plaintiff, before the said supposed adjudication in the said plea mentioned, in manner and form as the said defendant hath above in his said rejoinder alleged. And this the said plaintiff prays may be inquired of by the country, &c.

(d) See replications, as ante, 1210.

(e) See rejoinder, ante, 1220.

# REJOINDERS AND SUR-REJOINDERS IN REPLEVIN, TRESPASS, &c.

In the K. B. (or "C. P.")

A. B. } *Term, — Will. 4.* Common  
agst. } And the said plaintiff, as to the said rejoinder of the said defend- form of a  
C. D. } ant, to the said replication of the said plaintiff in the said [sec- sur-rejoin-  
ond] plea of the said defendant, saith that he, by reason of any thing by der (e).  
the said defendant in that rejoinder above alleged, ought not to be barred  
from having or maintaining his aforesaid action thereof against the said de-  
fendant, because he saith, that, &c.—[*State the subject-matter of the sur- Conclusion*  
rejoinder, and if merely a denial of the rejoinder, conclude thus :]—And to the  
this the said plaintiff prays may be inquired of by the country, &c. country.

[If the sur-rejoinder be of new matter, conclude with a verification, sim- Conclusion  
ilar to the conclusion of a replication. The form in trespass is as fol- with a ver-  
lows:]—And this the said plaintiff is ready to verify, wherefore, as be- ification in  
fore, he prays judgment, and his damages by him sustained, on occasion of trespass.  
the committing of the said trespasses, to be adjudged to him, &c.

C. D. } And the said plaintiff, as to the said replication of the said de- Rejoinder  
ats. } fendant, to the said plea in bar of the said plaintiff to the said in replevin  
A. B. } avowry [or, "cognizance"] of the said defendant, saith, that the (f).  
said defendant ought not, by reason of any thing by him in that replica-  
tion alleged, to avow the taking of the said [cattle] in the said [close] in  
which, &c. and justly, &c. because he saith, that, &c.—[*Here state the*  
*subject-matter of the rejoinder and conclude to the country, or with a veri-*  
*fication, as in a plea in bar, as ante, 1189.*]

[*Precludi non, as ante, 1201.*]—Because he saith, that after the giving Sur-rejoin-  
of the said notice in the said rejoinder mentioned, and before the expira- der in tres-  
tion of the said tenancy, to wit, on, &c. at, &c. (*venue*) aforesaid, the said pass that  
defendant waived, relinquished, and abandoned the said notice, and \*then the notice  
and there assented and agreed with the said plaintiff to the continuance of to quit was  
the said tenancy in the said replication mentioned, and the said tenancy did waived (g).  
continue from thenceforth, until, and at, and after the said time when, &c. [ \*1236 ]  
to wit, at, &c. (*venue*) aforesaid. And this, &c.—[*Conclude with a veri-*  
*fication, as ante, 1235.*]

(e) See forms, *Boote's Suit at Law*, 222.

at Law, 280.—*Plead. A.* 478, 9.

(f) See the forms of rejoinders in replevin,  
Wentw. 6, 13.—*Lit. Ent.* 360.—*Boote's Suit*  
Vol. III.

(g) See the rejoinder, *ante*, 1232.

## REBUTTERS AND SUR-REBUTTERS.

IN TRES-  
PASS.Rebutter  
denying  
the waiver  
of the no-  
tice to quit.*In the K. B. (or "C. P.")*

— Term, — Will. 4.

C. D. }

ats. }

And the said defendant, as to the said sur-rejoinder of the said plaintiff, to the said rejoinder of the said defendant to the said replication to the said [second] plea of the said defendant, saith, that the said plaintiff ought not, by reason of any thing by him in that sur-rejoinder alleged, to have or maintain his aforesaid action against him in respect of the said supposed trespasses in the introductory part of the said [second] plea mentioned, because he saith, that the said defendant did not waive, relinquish, or abandon the said notice, or assent or agree with the said plaintiff to the continuance of the said tenancy in the said replication mentioned, nor did the same continue in manner and form as the said plaintiff hath above in his said sur-rejoinder in that behalf alleged. And of this the said defendant puts himself upon the country, &c.

*In the K. B. (or "C. P.")*

— Term, — Will. 4.

Sur-rebut-  
ter simili-  
ter.

A. B. }

ats. }

And the said plaintiff, as to the said rebutter of the said defendant, and whereof, he hath put himself upon the country, doth the like.

[\*1237]

## \*PLEAS &amp;c. TO NEW ASSIGNMENTS.

PLEAS.

General  
issue to  
new as-  
signment  
(a).*In the K. B. (or "C. P.")*

— Term, — Will. 4.

C. D. }

agst. }

And the said defendant, as to the said several supposed trespasses above newly assigned, saith, that he is not guilty thereof, or of any part thereof, in manner and form as the said plaintiff hath above therein complained against him. But of this he puts himself upon the country, &c.

Com-  
mence-  
ment of a  
special  
plea to a  
new as-  
signment  
(a).

And for further plea in this behalf, as to the said several supposed trespasses above newly assigned, the said defendant, by leave of the court here, for this purpose first had and obtained, according to the form of the

(a) When not advisable to plead the new assignment, but to suffer a judgment by default, see the note (e), infra.

(b) See a plea of set-off to a new assignment, in assumpsit, 3 Wentw. 163.

Statute in that case made and provided, saith, that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he saith that, &c.

PLEAS.

And this the said defendant is ready to verify, wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, in respect of the said supposed trespasses above newly assigned, &c.

Conclusion with a verification.

And the said defendant, as to the said trespass as above newly assigned, fully here in court confesses the said action of the said plaintiff, and that the said defendant was and is guilty thereof, [and that the said plaintiff hath sustained damages in respect thereof, to a small amount, to wit, the sum of 10s. (*a sum sufficient to cover the fullest damages for the expenses*) which he the said defendant is ready and willing to pay to the said plaintiff] (d). And the said defendant fully relinquishes and abandons much of this said first plea by him above pleaded, as traverses or denies, or can be deemed or construed to traverse or deny, the said trespasses above newly assigned, or any part thereof, or that the said plaintiff hath sustained damages in respect thereof, &c.

Confession of trespasses newly assigned, and relinquishment of the general issue to declaration, so far as it relates to such trespasses (c).

And the said plaintiff as to the said plea of the said defendant by him [st] above pleaded, to the said trespasses above newly assigned, and thereof he hath put himself upon the country, doth the like.

REPLICATION.

*Similiter* to general issue to new assignment. Commencement of replication to a special plea to a new assignment.

And the said plaintiff as to the said plea of the said defendant by him [secondly] above pleaded, as to the said trespasses above newly assigned, with that the said plaintiff ought not, by reason of any thing by the said defendant in that plea alleged, to be barred from having or maintaining his aforesaid action thereof against the said defendant in respect of the said several trespasses above newly assigned. Because he saith, that,

And this the said plaintiff is ready to verify, wherefore he prays judgment and his damages by him sustained, by reason of the committing of the said several trespasses above newly assigned, to be adjudged to him,

Conclusion with a verification.

(d) As to the expediency of this form of 196.—Tidd, 9th edit. 966, 978. being, in order to avoid the costs of the (d) *Quare*, if this averment between and inquiry, see 9 B. & C. 618.—5 Bingh. brackets be necessary.

# \*PLEAS PUIS DARREIN CONTINUANCE.

*In the King's Bench.*

On — the — day of — (b),  
in — Term, — Will. 4.

Plea in  
bank, and  
before the  
return of  
the venire  
puis dar-  
rein con-  
tinuance of  
release,  
&c. not at  
the assizes  
(a).

C. D. }  
agst. } And now at this day, that is to say, on — the — day of  
A. B. } — in this same Term, until which day the plea aforesaid was  
last continued, comes the said plaintiff by — his attorney, and the said  
defendant by his attorney aforesaid, and the said defendant saith, that the  
said plaintiff ought not *further* (c) to have or maintain his aforesaid action  
thereof against him, because he saith, that after the last continuance of  
this cause, that is to say, after — the — day of — in this same  
— Term, from which day this cause was last continued, and before  
this day, to wit, on, &c. at, &c. (*venue*) the said plaintiff [*here state the  
release as ante, 930, or other subject matter of the plea,*] and this the said  
plaintiff is ready to verify, wherefore he prays judgment, if the said plain-  
tiff ought *further* to have or maintain his aforesaid action thereof, against  
him, &c.

The like at  
the as-  
sises (d).

[\*1239] And now at this day, to wit, on the — day of — in the — year  
of the reign of our sovereign lord William the Fourth, by the grace, &c.  
before — and — justices of our said lord the now king, appointed to  
take the assizes in and for the county of — aforesaid, at, — in the  
same county, comes the said defendant by G. H. esq. his counsel, and  
saith, that the said plaintiff ought not further to maintain his action against  
the said defendant, because he saith, \*that after the making of the said  
several supposed promises and undertakings, [or after the accruing of the  
said several supposed causes of action,] in the said declaration mentioned,  
and after the last continuance of the plea aforesaid, that is to say, after the  
— day of — (*the return day of the venire facias*) last past, from  
which day, until the — day of — in — Term next, unless the jus-  
tices of our lord the king, assigned to hold the assizes of our said lord the  
king, in and for the said county of — should first come, on the — day  
of — in the said county of — the action aforesaid is continued, to wit,  
on, &c. at, &c. (*venue*) the said plaintiff by his certain writing of release,  
sealed with his seal, dated, &c. did release, &c. [*State the profert, and  
the particular matters released, as ante, 930, and conclude as follows:*]—  
And this the said defendant is ready to verify, wherefore he prays judg-  
ment if the said plaintiff ought further to have or maintain his said action  
thereof against him, &c.

(a) As to this plea in general, see ante, vol. I. Index, "*Puis Darrein Continuance*." Bul. N. P. 309.—Selw. N. P. 118.—Com. Dig. Abatement, H. 32. I. 24. And when it is not necessary to plead specially matter of defense arising since the commencement of the suit, see 9 East, 82.—See *Qms* referred to, 10 Wentw. xcii.—2 Rich. C. P. 22, and form,

post, 1241, 4. The plea may, it seems, be put in at *Nisi Prius* on paper, Ry. & Moo. C. N. P. 404.

(b) As to the title, see 3 T. R. 554.

(c) This seems necessary, see 4 East, 507.—Ante, 907, and 913, second form.

(d) See the notes to the above form.



And now at this day, that is to say, &c. [*proceed to state the continuance, as in the preceding form, ante, 1238,*] comes the said defendant, by C. D. his attorney aforesaid, and saith that the said plaintiff ought not further to have or maintain his aforesaid action thereof against him.—Because he says, that S. N. after the death of the said testator, to wit, in that said Term, by bill, without the writ of our lord the king, [or, *if in C. P. or by original, &c.* “describe it accordingly,”] had impleaded the said defendant as executor as aforesaid, in the court of our said lord the king, before the king himself, at Westminster, in the county of Middlesex, in a certain plea [debt for the sum of £— for money borrowed by the testator from the said S. N. in his life-time, and due and owing at the time of his death,] and that such proceedings were thereupon had in the said court of our said lord the king, in the said plea, that the said S. N. afterwards, and after the last continuance in this said cause, and before this day, to wit, on, &c. by the consideration and judgment of the said court, recovered in the said plea against the said defendant as executor as aforesaid her said debt of £— and also [80s.] which by the same court were adjudged to the said S. N. for her damages which she had sustained, as well on occasion of the detaining of that debt, as for the costs and charges by her about her suit in that behalf expended, whereof the defendant was convicted, as by the record and proceedings thereof remaining in the said court of our said lord the king, before the king himself, at Westminster aforesaid, will more fully appear; which said judgment so had and obtained as aforesaid, still remains in full force and effect, not in any wise reversed, annulled, discharged, or satisfied. And this the said defendant is ready to verify, wherefore he prays judgment if the said plaintiff ought farther to have or maintain his aforesaid action thereof against him, &c.

PLEA PUIS  
DARREIN  
CONTINU-  
ANCE, &c.  
Plea in  
band puis  
darrein  
continu-  
ance,  
by an exe-  
cutor, of  
judgment  
recovered  
against  
him by an-  
other cred-  
itor (c).

C. D. executor, &c. }

ats.

A. B. }

“And now at this day, to wit, on the 16th day of October, in the 1st year of the reign of our sovereign lord William the Fourth, to which day the sittings at Nisi Prius, which began on the 11th day of October, in the year aforesaid, was in due manner continued, before the right honorable Charles Lord Tenterden, the chief justice of our said lord the king, assigned to hold pleas before the king himself, comes the said defendant by T. P. his counsel, and saith, that the said plaintiff ought not further to have or maintain his aforesaid action against the said defendant, because he saith, that one J. P. after the death of the said R. H., to wit, in [Trinity] Term last, by bill, without the writ of our said lord the king, impleaded the said defendant, as executor as aforesaid, in the court of our said lord the king, before the king himself here, in a certain plea of trespass on the case, upon promises made by the said R. H. in his life-time to the said J. P., to the damage of the said J. P. of [£67 6s. 7d. ;] and such proceedings were thereupon had in the said court of our said lord the king, before the king himself here, in that plea, that the said J. P. according to the course and cause, and before this day, to wit, on the 11th day of August, in the 1st

[\*1240]  
Plea at  
Nisi Prius  
of a judg-  
ment re-  
covered in  
assumpsit  
against de-  
fendant as  
executor.

PLEA PUIS  
DARREIN  
CONTINU-  
ANCE, &c.

year of the reign aforesaid, duly obtained as of last Trinity Term, a certain judgment of the said court against the said defendant, as executor as aforesaid, whereby it was considered by the said court, that the said J. P. should recover against the said defendant, as executor as aforesaid in that plea, [£71 7s. 7d.] for damages which he had sustained as well by reason of the not performing the said promises and undertakings last mentioned, as for his costs and charges by him about his suit in that behalf expended, whereof the said defendant was convicted; as by the record and proceedings thereof, still remaining in the said court of our said lord the king, before the king himself here, more fully appears; which said judgment still remains in full force and effect, not in any wise annulled, discharged, or satisfied; and the said defendant further saith, that he hath fully administered all and singular the goods and chattels which were of the said R. H. at the time of his death, which have ever come to his hands [ \*1241 ] to be administered, except goods and chattels of small value, to wit, of the value of [£20 6s. 8d.] and that the said defendant hath not nor at the time of the exhibiting the bill of the said plaintiff in this behalf, nor at any time since, had any goods or chattels which were of the said R. H. at the time of his death, in his the said defendant's hands to be administered; except goods and chattels to the value of [£20 6s. 8d.] and no more, which are not sufficient to satisfy the said damages so recovered by and due and owing upon the said judgment as aforesaid, and which are subject and liable to satisfy the said damages. And this the said defendant is ready to verify, wherefore he prays judgment if the said plaintiff ought further to have or maintain his said action against him, &c.

*In the King's Bench.*

Between. { A. B. . . . . plaintiff,  
and  
C. D. executor, &c. defendant.

Affidavit  
of the  
truth of  
such plea  
(f).

C. D. of — Strand, in the county of — the above-named defendant, maketh oath and saith, that the judgment mentioned in the plea of the said defendant, by him pleaded since the last continuance of this cause, and hereunto annexed, was signed and obtained by J. P. therein named, against this defendant, on the 11th day of June, 1830, and was so signed and obtained for a debt justly due and owing from the above-named R. H. to the said J. P. in the life-time of the said R. H. and at the time of his death; and that the said debt, at the time the said judgment was so signed as aforesaid, was and still is due and unpaid; and this defendant further says, that the said plea hereunto annexed is true in substance and in fact.

Sworn at Westminster-hall, the  
16th of October, 1830, before  
me, (Signed) *Tenterden*.

(Signed) C. D.

Plea puis  
darrein  
continu-  
ance, at  
the Sit-

C. D. }  
ats. } And now at this day, to wit, on the — day of — (the day  
A. B. } of trial) in the first year of the reign of our sovereign lord

(f) The affidavit need not be entitled in *sed quare*. See 3 Price, 200, 201, and the cause, 5 Taunt. 833—1 Marsh. 70, 8. C. *contra*.

William the Fourth, at the Sittings of \*Nisi Prius, holden at the Guildhall of the city of London, in and for the said city of London, before the right honorable Charles Lord Tenterden, his Majesty's chief justice assigned to hold pleas in the court of our said lord the king, before the king himself, comes the said defendant, by — esq. his counsel and saith, that the said plaintiff ought not further to maintain his action against the said defendant, because he saith, that after the said several supposed causes of action in the said declaration mentioned, accrued to the said plaintiff, and after the last continuance of the plea aforesaid, that is to say, after the (h) — day of — last past, until (i) — next after — in [Easter] Term next, unless the said right honorable Charles Lord Tenterden, his Majesty's chief justice assigned to hold pleas in the court of our said lord the king, before the king himself, should first come on the (k) — day of — at the Guildhall of the city of London, the said action is continued, to wit, on the — day of — in the year of our Lord — to wit, at, &c. (*venue*) aforesaid, the said plaintiff, by his certain writing of release, sealed with his seal, and which the said defendant now brings here into court, the date whereof is the day and year last aforesaid, did remise, release, and forever quit claim unto the said defendant, his heirs, executors, and administrators, all and all manner of action and actions, cause and causes of action, suits, bills, bonds, writings obligatory, debts, dues, duties, accounts, sum and sums of money, judgments, executions, extents, quarrels, controversies, trespasses, damages, and demands whatsoever, both in law and in equity, or otherwise howsoever, which he the said plaintiff then had, or which he should or might at any time or times thereafter have, claim, allege, or demand against the said defendant, for or by reason or means of any matter, cause, or thing whatsoever, from the beginning of the world to the day of the date of the said deed or writing of release, as by the said deed or writing of release, reference being thereunto had, will fully appear. And this the said defendant is ready to verify, wherefore he prays judgment if the said plaintiff ought further to have or maintain his aforesaid action thereof against him, &c.

PLEA PUIS  
DARREIN  
CONTINU-  
ANCE, &c.

tings after  
Term, at  
Guildhall,  
of a re-  
lease (g).

And now at this day, that is to say, on, &c. until which day the trial of the said action was adjourned by the right honorable Charles Lord Tenterden, his majesty's chief justice, &c. comes the said defendant, &c. [*alleging the fact to have happened in the usual way, and as in the preceding form, after the return of the venire,*] from which day, until the day in bank, unless the chief justice should first come, &c. the action is continued, &c.

Plea at the  
Sitting be-  
fore Term  
adjourned,  
from the  
Sittings af-  
ter.

[\*1243]

C. D. }

ats.

A. B. }

And now at this day, to wit, on, &c. in the — year of the reign of our sovereign lord the now king, at the sittings of Nisi Prius, holden at the Guildhall of the city of London, in and for the said city of London, before the right honorable Sir Nicholas Conyngham Tindal, knight, his Majesty's chief justice assigned to hold pleas in his Majesty's court of the Bench, by force of the Statute in such case made

Plea in the  
Common  
Pleas, of  
defendants  
bankrupt-  
cy and  
certificate,  
puis dar-  
rein con-  
tinuance, at  
Guildhall  
(l).

(g) See the form, ante, 1238.—2 Rich. C. P. 22.—10 Wentw. Index, xxi.

(h) The return day of the *renire facias*, See Bal. Ni. Pri. 310.

(i) Return of *distringas*.

(k) Day of trial.

(l) See 16 East, 628, 4.—6 B. & C. 623.

PLEA PUIS  
DARREIN  
CONTINU-  
ANCE, &c.

and provided, comes the said defendant, by his counsel, J. W. esq. serjeant-at-law, and says, that the said plaintiff ought not further to have or maintain his aforesaid action thereof against the said defendant, because, &c. [*State the trading of defendant, petitioning creditor's debt, act of bankruptcy, commission issued, and defendant's being found bankrupt, notice in London Gazette, defendant's surrender and examination, and defendant's conformity, as ante, 913 to 915, and then proceed as follows.*].—And the said defendant in fact saith, that having so conformed himself to the said Statute made and in force concerning bankrupts, the said H. R., R. W. C. and J. H. (being the major part of the said commissioners,) authorized by the said commission, heretofore, to wit, on, &c. at, &c. by their certain certificate, in writing under their hands and seals, did certify to Henry Lord Brougham, then and still being Lord Chancellor of Great Britain, &c. [*here proceed to state the contents of the certificate.*] and that there did not appear to them any reason to doubt of the truth of such discovery, or that the same was not a full discovery of all his the said bankrupt's estate and effects, which said certificate had been and was, previous to the said signature thereof by such commissioners as aforesaid, signed by three parts in five in number and value of the creditors of the said defendant, so being such bankrupt as aforesaid, who were creditors for not less than £20 respectively, and who had duly proved their debts under the said commission, and by such signature as aforesaid, testified their consent to such allowance

[\*1244] and certificate, and to the said defendant's discharge, as such bankrupt as aforesaid, in pursuance of the said Statute; and the said defendant in fact further saith, that the said certificate having been so signed and allowed as aforesaid afterwards, and since the last continuance of the plea aforesaid, that is to say, after the — day of — in the year last past, from which day until the — [2d day of November,] in Michaelmas Term next, unless the said right honorable Sir Nicholas Conyngham Tindal, knight, his said Majesty's chief justice, assigned to hold pleas in the said court of the Bench aforesaid, should first come on the — day of — in the year of our Lord — aforesaid, at the Guildhall of the city of London, and before this day, to wit, on the day, &c. last aforesaid, at, &c. (*venue*) aforesaid, in due manner laid before the said Lord High Chancellor, for the allowing and confirming the same, and the same was thereupon then and there, after the said defendant had previously made oath that such certificate and consent of the creditors thereupon as aforesaid, was obtained fairly and without fraud, in due form of law allowed and confirmed by the said Lord High Chancellor; and the said defendant further saith, that the said several causes of action, in the said declaration mentioned, accrued, and each and every of them did accrue, &c.—[*Conclude as ante, 916.*]

*In the King's Bench.*

*On — the — day of — instant, in this present Hilary Term, — Will. 4.*

Plaintiff's  
discharge  
under In-

C. D. }  
ats. }  
A. B. }

And now at this day, to wit, on — the — day of — in this same Term, until which day the plea aforesaid was last

continued, come, as well as the said plaintiff as the said defendant, by their respective attornies aforesaid; and the said defendant says, that the said plaintiff ought not further to maintain his aforesaid action thereof against the said defendant, because he says, that after the supposed debts, [or if the action be in *assumpsit*, alter this form accordingly throughout], and said several causes of action, and each of them in the said declaration mentioned, accrued to the said plaintiff, to wit, on, &c. [*the day of subscribing petition*], he the said plaintiff was a prisoner in the custody of the marshal of the Marshalsea of our lord the now king, in the [King's Bench] prison, [in the Borough of Southwark in England,] at the suit of one E. E. and other his creditors, within the meaning of a certain Act of Parliament, made and passed in the seventh year of the reign of his late Majesty King George the Fourth, intituled, "An act for the Relief of Insolvent Debtors in England." And the said defendant further saith, that afterwards, and whilst the said plaintiff remained in custody as aforesaid, and within the space of fourteen days next after the commencement of the actual custody aforesaid, to wit, on the day and year last aforesaid, to wit, at, &c. (*venue*) aforesaid, he the said plaintiff did apply by petition, in a summary way, to the court for Relief of Insolvent Debtors in England, for his discharge from the custody aforesaid, according to the provisions of the said Act, and in compliance therewith; and the said plaintiff did then and there subscribe such petition, and filed the same in the said court; and the said defendant further saith, that at the time of subscribing the said petition, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, he the said plaintiff did duly execute a conveyance and assignment to one J. D. then and still being the provisional assignee of the said court, in such form as is to the said Act annexed, of all the estate, right, title, interest, and trust of such prisoner, in and to all the real and personal estate and effects of the said plaintiff, both within this realm and abroad, except the wearing apparel, bedding, and other such necessities of the said plaintiff and his family, and the working tools and implements of the said plaintiff, not exceeding in the whole the value of £20, and of all future estate, right, title, interest, and trust of the said plaintiff, and to any real and personal estate and effects within this realm or abroad, which the said plaintiff might have purchased, or which might revert, descend, be devised or bequeathed, or come to him, before he should become entitled to his final discharge, in pursuance of the said Act, according to the adjudication made in that behalf; or in case the said plaintiff should obtain his discharge from custody, without any adjudication being made in the matter of his petition then before, the said plaintiff should be at large and out of custody, and of all debts due or growing due to the said plaintiff, or to be due to him before such discharge as aforesaid, the said conveyance and assignment being made subject to a proviso, that in case the petition of the said plaintiff should be dismissed by the said court, such conveyance and assignment should from and after such dismissal, be null and void to all intents and purposes. And the said defendant further saith, that afterwards, to wit, at and before the court for Relief of Insolvent debtors in England, held in *Portugal street*, Lincoln's Inn Fields, in the county of Middlesex, and after the last continuance of

PLEA PUIS  
DARREIN  
CONTINU-  
ANCE, &c.

solvent  
Act after  
issue join-  
ed (m).

(m) See pleas of insolvency, ante, 919.

PLEA PUIS  
DARREIN  
CONTINU-  
ANCE, &c.

this cause, that is to say, after — the — day of — in Michaelmas Term last past, from which day this cause was last continued, and before this day, to wit, on, &c. [*day of hearing petition*], the said petition, and a certain schedule before then signed and filed by the said plaintiff, in pursuance of the said Act; and the matters thereof came on to be heard and was examined into before and by the said court, and the said plaintiff then and there applied to be discharged and exonerated under the said Act; and the said court did then and there adjudge the said plaintiff to be discharged from custody, and to be entitled to the benefit of the said Act, in pursuance of the provisions of the said Act, and the said plaintiff was accordingly then and there discharged from the custody aforesaid. And the said defendant further says that by force of the said Act, conveyance, and assignment, and premises aforesaid, all the estate, right, title, trust, and interest of the said plaintiff, of, in, and unto the said supposed debts and causes of action in the said declaration mentioned, and all the real and personal estate and effects of the said plaintiff, were then and there immediately after such adjudication, thereby vested in the said J. D. esq. as such provisional assignee as aforesaid, upon the trusts and for the purposes in the said Act mentioned, to wit, at, &c. (*venue*) aforesaid. And this the said defendant is ready to verify, wherefore he prays judgment if the said plaintiff ought further to have or maintain his aforesaid action thereof against him, &c.

Plea of re-  
lease puis  
darrein  
continu-  
anceplead-  
ed at the  
assizes (n).

T. C. }  
ats. } And now at this day, that is to say, on [Wednesday] the  
R. S. } [22d] day of [July] in the year of our Lord [1831], comes the  
said defendant by C. P. his counsel, and says, that the said plaintiff ought  
not further to maintain this action against the said defendant, because he  
says, that after — the — day of — in Trinity Term last past,  
from which day until — the 2d day of November, in Michaelmas Term  
next, (unless the justices of our lord the king, assigned to hold the as-  
sises of our lord the king in and for the county of [Hereford], shall  
first come on [Wednesday] the [22d] day of [July] in the year of our  
Lord [1831], at [Hereford] in the said county of [Hereford],) the action  
aforesaid is continued, and before this day, to wit, on the 18th day of July,  
in the year of our Lord 1831, at, &c. (*venue*) the said plaintiff, by his deed,  
bearing date the same day and year last aforesaid, did remise, release, and  
forever quit claim unto the said defendant his heirs, executors, and ad-  
ministrators, all and all manner of action and actions, cause and causes of  
[ \*1245 ] action, suits, bills, bonds, writings obligatory, \*debts, dues, duties, ac-  
counts, sum and sums of money, judgments, executions, extents, quarrels,  
controversies, trespasses, damages, and demands whatsoever, both in law  
or equity, and otherwise howsoever, which against the said defendant he  
the said plaintiff then had, or ever had, and which he the said plaintiff, his  
heirs, executors, or administrators, should or might thereafter have, claim,  
challenge, or demand, for or by reason or means of any matter, cause, or  
thing whatsoever, from the beginning of the world until the day of the date

thereof. And this the said defendant is ready to verify, wherefore he prays judgment, if the said plaintiff ought further to maintain his action against him.

PLEA PUIS  
DARREIN  
CONTINU-  
ANCE, &c.

C. P.

Between { R. S. . . . . plaintiff,  
                    and  
                    T. C. . . . . defendant.

T. C. of the parish of — in the liberties of the city of — the above-named defendant, maketh oath and saith, that the plea hereunto annexed is true in substance and matter of fact.

Affidavit  
of the  
truth of  
plea puis  
darrein  
continu-  
ance.

T. C.

Sworn in court, the — day of  
— before me, N. C.

*In the King's Bench.*

— Term, — Will. 4.

R. } And the said plaintiff, as to the said plea of the said defendant by  
T. } him above pleaded, saith, that he the said plaintiff, by reason of any  
thing by the said defendant in that plea alleged, ought not to be barred  
from further having and maintaining his aforesaid action thereof against the  
said defendant, because he saith, that the said supposed writing of release,  
in the said plea mentioned, was had and obtained from the said plaintiff by  
the fraud and covin of the said defendant, to wit, at, &c. (*venue*). And  
this the said plaintiff is ready to verify, wherefore he prays judgment and  
his damages by him sustained, on occasion of the non-performance of  
the said several promises and undertakings in the said declaration men-  
tioned, to be adjudged to him, &c.

Replication  
in bank; to  
plea of re-  
lease, puis  
darrein  
continu-  
ance; that  
the release  
was ob-  
tained by  
fraud (o)

## \*DEMURRERS.

[\*1246]

*In the K. B. (or "C. P.")*

— Term, — Will. 4.

C. D. }  
ats. } And the said defendant by E. F. his attorney, comes and de-  
A. B. } fends the wrong and injury, when, &c. and says, that the said  
declaration [or, *if to a count only*, "the said — count of the said de-  
claration,"] and the matters therein contained, in manner and form as the  
same are above stated and set forth, are not sufficient in law for the said  
plaintiff to have or maintain his aforesaid action thereof against the said  
defendant, and he the said defendant, is not bound by law to answer the  
same. And this he is ready to verify, wherefore, by reason of the insuffi-  
ciency of the said declaration [or, "— count of the said declaration,"]  
in this behalf, the said defendant prays judgment, and that the said plaintiff

TO DECLARATIONS,  
&c.  
General demurrer to a declaration (a).

(o) See pleas, ante, 1238, 1241.

(a) When a general demurrer to the whole declaration is improper, see 14 East, 465. For an objection in the matter of form the demurrer should in all cases be special, 10 East, 359. See form of demurrer, 1 Lil. Ent. 8, 106.—Plead. A. 213, 232.—1 Rich. C. P. 194, 195.—2 Id. 146. See several forms of special demurrers, post, 1247 to 1253.

TO DEC-  
LARA-  
TIONS, &c.

may be barren from having or maintaining his aforesaid action thereof against him, &c.

Special de-  
murrer (a).

[*When the causes of demurrer are stated, as in general advisable, proceed as in the above form to the end, and then as follows:*]—And the said defendant according to the form of the statute in such case made and provided, states, and shows to the court here the following causes of demurrer to the said declaration [*or, if the demurrer be to some particular count only, then say, "to the said — count of the said declaration,"*] that is to say, that, &c. [*Here state the particular causes, and conclude thus:*] and also that the said declaration [*or, "— count of the the said declaration,"*] is in other respects uncertain, informal, and insufficient, &c.

CAUSES OF  
DEMURRER  
TO DECLAR-  
ATION.

Special de-  
murrer for  
that declara-  
tion is  
not entitled  
of any  
court or  
term, and  
contains  
repugnant  
promises.

For that the said declaration is not entitled of any court, neither doth it appear in and by the said declaration in what court the said action is brought against the said defendant, and also for that it doth not appear in or by the said declaration of what Term the writ or process upon which the said declaration was founded, was or is returnable, and also for that the said declaration is not entitled of any Term whatever. And also for that it doth not appear that there was or is any writ or process whatsoever sued out of any court, whereon to found the said declaration against him, and also for that the said declaration contains two distinct promises-alleged to have been made by the said defendant to the said plaintiff, altogether repugnant to and inconsistent with each other, and also for that the said first count contains two several promises, alleged to have been made by the said defendant to the said plaintiff, founded on certain supposed considerations and liabilities, in that count alleged, inconsistent with those promises and undertakings, and also for that the said declaration is in other respects uncertain, informal, and insufficient, &c.

[\*1247]

To a declaration  
for being  
entitled  
generally  
of the term  
when the  
cause of  
action ac-  
crued after  
the first (b).

[*Commencement of demurrer, as ante, 1246.*]—That the said declaration appears to be exhibited and is entitled of — Term generally, whereby it has relation to and must be deemed a declaration of the first day of that Term, whereas the said several promises, in the said declaration mentioned, are all of them therein laid to have been made by the said defendant, and the said several causes of action therein also mentioned to have arisen on the — day of — in the year of our Lord — which said — day of — was a day after the first day of that same — Term, wherein the said plaintiff hath so declared against him the said defendant, and whereof the said declaration is so generally entitled as aforesaid; and also for that the said declaration, by the memoranda thereof, appears to have been exhibited before any of the causes of action of the said plaintiff therein mentioned, appear to have accrued, and also for that the said declaration is in other respects uncertain, informal, and insufficient, &c.

To a bill  
against an  
attorney

For that the bill aforesaid appears to have been exhibited in and entitled of — Term last past, whereas the several supposed causes of action



therein mentioned, and each and every of them appear to have arisen and accrued on a day subsequent to that Term; and also for that the said bill, by the memorandum thereof, appears to have been exhibited before the said several supposed causes of action in the said bill mentioned, or any or either of them, did accrue, and also for that, &c.

CAUSES OF  
DEMURRER  
TO DECLAR-  
ATIONS.

for being  
filed before  
cause of  
action ap-  
pears to  
have arisen  
(c).

For being  
too gene-  
ral, and not  
stating a  
sufficient  
cause of  
action; al-  
so because  
there are  
divers  
blanks and  
material  
omissions  
in the de-  
claration.

[\*1248]  
For not  
stating a  
time when  
the promi-  
ses were  
made, and  
because  
there are  
blanks left  
in the de-  
claration.  
For omit-  
ting the  
venue.

To last  
count of a  
declaration  
for not lay-  
ing a ve-  
nue where  
the offen-  
ses are  
supposed  
to have  
been com-  
mitted.  
To a de-  
claration  
for joining  
counts in  
trover and  
in assump-  
sit (e).

That there is not in all or any of the counts of the said declaration, any causes of action shown or stated by or for the said plaintiff to have or maintain his aforesaid action against the said defendant, inasmuch as in the said declaration the number of miles which the said horses, in the said counts respectively mentioned, were hired or let out to draw the said several carriages or hearses, in those counts respectively mentioned, is not stated, alleged, or specified in any of the counts of the said declaration, nor are the places from and to which the said horses were to draw the carriages or hearses, or any of them, specified; and for that there is no specific offence charged against the said defendant in any of the counts of the said declaration, and for that there are divers blanks left in each and every count of the said declaration, and there are divers omissions of material statements and averments, namely, of places, terms, and distances, in each and every count of the said declaration; and for that the said declaration is drawn in a negligent, slovenly, and untechnical manner, disgraceful (d) to the records of the court, and is in every respect insufficient, uncertain, defective, and informal, &c.

For that it does not appear in or by the said declaration on what day, or in what month, the said defendant made the several supposed promises and undertakings therein mentioned, or any of them; and also that there are divers blanks and void spaces in the said declaration which render the sense thereof uncertain and obscure, &c.

For that as there is no venue or place alleged in or by the said second count of the said declaration, where the said defendant was indebted to the said plaintiff as therein mentioned, &c.

For that there is no venue or place alleged in and by the said last-mentioned counts, or any or either of them, at which the said defendant is supposed to have committed the several offenses therein respectively mentioned, or any or either of them, and for that the said last-mentioned counts are in other respects uncertain, &c.

For that in and by the said declaration in the first count thereof, the said plaintiff hath declared and complained against the said defendant in a plea of trespass on the case for a certain supposed wrongful conversion and

(c) See the form, 5 T. R. 326, *Dodsworth v. Bowen*.—Ante, 12, and the last form; vol. i. page 294, 292.

(d) Though this demurrer was framed by every eminent Pleader, yet the adoption of these harsh, abusive expressions, seems unnecessary, and it is more judicious to omit

them.

(e) The declaration was held sufficient; but joining the cause of demurrer affords a useful precedent. The defendant must demur to the whole declaration for misjoinder, and not to any particular count, 1 M. & S. 355.—Ante, vol. i. page 223, 9.

CAUSES OF  
DEMURRE  
TO DECLAR-  
ATIONS.

To a declaration at the suit of administration, with the will annexed, for not showing that proper letters of administration were granted to her (f)

[\*1250]

The first count in assumpsit for laying the promise to pay whenever plaintiff should be requested, and to second count for laying the undertaking to pay in consideration of work done by defendant. To second, third, and last counts of declaration, for laying the promises on an impossible day.

disposal of the said spaniel and setting-dog therein mentioned of the said plaintiff to the use of him the said defendant, and yet in the second and last counts of the said declaration, the said plaintiff hath declared against the said defendant in the above suit in an action of assumpsit for supposed breaches of express or implied promises in not returning and re-delivering certain spaniels therein respectively mentioned, supposed to be lent and delivered by the said plaintiff to the said defendant, and not for any supposed wrongful conversion and disposal thereof; and also for that there are in the said declaration pretended causes of action, different in their natures, comprehended and included in the same declaration, to wit, a pretended cause of action founded on a supposed wrongful conversion and disposal of a spaniel and setting-dog of the said plaintiff and pretended causes of action, grounded on promises which are incompatible with each other, and ought not to be joined in the same declaration; and also for that causes of action, founded on supposed willful and determined wrongs and injuries, ought not, and cannot be blended and included in one and the same declaration, with causes of action founded on promises or contracts; and also, &c.

For that it is not stated in or by the said declaration, that administration, with the will annexed, of all and singular the goods and chattels, rights, and credits, which were of the said E. G. deceased, at the time of his death, was in due form of law committed to the said plaintiff after the decease of him the said E. G. but in lieu thereof there is the following allegation mentioned in the said declaration, that is to say, "To which said J. P. (the plaintiff) administrator of all and singular the goods, chattels, rights, and credits, which were of the said E. G. deceased, at the time of his death, was by John, by Divine Providence, Archbishop of Canterbury, primate of all England, and metropolitan, after the decease of the said E. G. to wit, on, &c. at, &c. (*venue*) aforesaid, in due form of law committed," &c

\*For that it is stated and alleged in and by the said first count of the said declaration, that the said defendant undertook, and to the said plaintiff faithfully promised to pay to him the said sum of money in that count mentioned, whenever afterwards he the said plaintiff should be thereunto requested; and also for that the supposed promise and undertaking, in the second count of the said declaration mentioned, is thereby stated and alleged to have been made, in consideration that the said defendant had done, performed, and bestowed, by himself and his servants, the said work and labor in that count mentioned. And also, &c.

For that the several supposed promises and undertakings, in the said second, third, and last counts of the said declaration mentioned, are and each and every of them is, laid and alleged to have been made on the 31st day of November, in the year of our Lord 1830, when there was

(f) N. B. The declaration stated, that "J. H. late of, &c. was summoned to answer J. P. administrator with the will annexed," &c.; but which latter words were omitted in

the breach, where the granting of letters of administration is stated, which was the cause of the demurrer.

such day, and it was therefore impossible that such last-mentioned promises and undertakings, or any of them, should have been made thereon.

CAUSES OF  
DEMURRER  
TO DECLAR-  
ATIONS.

For that the said plaintiffs in their said declaration complain of the said defendants, executors as aforesaid, in the *debet* and *detinet*, whereas the said plaintiffs ought to have declared against them the said defendants in the *detinet* only, since the said plaintiffs sue the said defendants as executors of the last will and testament of E. F. deceased; and for that it appears in and by the said declaration, that the said defendants, executors as aforesaid, cannot owe the said money demanded of them to the said plaintiffs, inasmuch as they the said plaintiffs sue the said defendants as executors as aforesaid.

Demurrer to declaration in debt against executor for declaring against them in the *debet* and *detinet* (g).

For that the said plaintiffs have declared against the said defendant in the *debet* and *detinet*, although the said plaintiffs are stated to be executors of the last will and testament of the said E. F. deceased, and ought therefore to have declared against him in the *detinet* only.

The like in another form.

For that the said plaintiff hath in and by his said declaration, declared upon a judgment supposed to have been given, and a cause of action supposed to have arisen in the county of Middlesex, and yet had laid the venue of and in his said action in London, and hath not shown any causes of action arising there whereon to ground the said suit, and for that the said plaintiff hath not laid any proper venue therein, &c.

Demurrer to declaration in *scire facias* on a judgment for not laying the venue in the country where the judgment was obtained (h).

For that the said plaintiff hath not brought the said supposed deed of release into court, or made any provert thereof, and because the defendant, in the manner the said supposed deed of release is above pleaded, cannot have oyer of the same so that she might know whether it is, or is not the deed of the said defendant, and because it doth not appear by the plea whether the said supposed deed of release is actually destroyed, or whether it doth not still exist, and is only lost or mislaid.

[\*1251]

Demurrer for not making a provert of a deed (i).

For that it is not alleged nor does it appear by the said declaration of the said plaintiff, when, or in what particular place or places in the said parish, in the said declaration mentioned, the goods and chattels in the said declaration mentioned, or any part thereof, were taken, whereby the said defendant is totally prevented from making a proper defense to the said declaration, and for want of naming or mentioning in the said declaration the place or places where the said goods and chattels, or any part thereof, are above supposed to have been taken, the defendant is prevented from taking any issue upon the place of taking, &c.

For not describing the locus in quo in a declaration in replevin (k).

For that the said plaintiff hath not, in and by his said declaration, alleged or shown in what particular place or places within the parish of — the said defendant took the said goods and chattels in the said declaration mentioned, or any part thereof, nor hath specified or shown in his

For not properly describing the locus in quo, and for not

(g) See ante, vol. i. page 315.  
(h) See ante, 482.

(i) See 3 T. R. 151.  
(k) See ante, 843.

specifying the number or kind of cattle, &c. dis-trained.

Demurrer to declaration in trespass for stating trespasses by way of recital, and for omitting *vi et armis* and *contra pacem* (1).

[\*1252]

To-declaration, first, for declaring against defendants as assignees; secondly, for not laying the venue sufficiently; thirdly, for beginning the declaration "For that whereas," it being in trespass; fourthly, for being too general, words badly spelt, &c. For stating an assault to have been committed on divers days (m).

[\*1253]

said declaration the number or kind of cattle by the said declaration alleged and supposed to have been taken by the said defendant; by means whereof the said plaintiff hath endeavored to prevent the said defendant from making a proper defense to the said declaration, &c.

For that the said plaintiff by his said declaration complained against the said defendant, as if the supposed cause of action, in the said declaration mentioned, had been a mere consequential injury, whereas it appears to have been an immediate and direct trespass committed by the said defendant to the property of the said plaintiff; and for that the said plaintiff hath complained against the said defendant as in a plea of trespass on the case, whereas the declaration ought to have been in a plea of trespass *vi et armis*; that the said defendant was not, by the said declaration, positively charged with any of the facts therein contained, and the same were only charged by way of recital, whereas they ought to have been positively averred upon him; and also that it is not alleged, that the supposed trespass was committed with force and arms, nor against the peace, &c.

That the said plaintiff hath declared against the said defendants, as assignees of E. F. a bankrupt, whereas if they are liable at all, they are liable on their own personal liability, and not as assignees as aforesaid; and for that the venue in each and every of the counts in the said declaration is not sufficiently laid the same being laid at Walworth Common, without naming any parish, town, or village; and for that the said supposed trespasses in the said first count of the said declaration mentioned, are not charged directly, expressly or positively, but the same are only stated and set forth by way of recital and inducement; and also for that in the said third and last counts of the said declaration, there are certain words which are wholly unintelligible, and the words "twelve other different articles *do & curtains*," are uncertain and unintelligible, and for that the said declaration is in other respects, &c.

For that the said plaintiffs have, in and by the said first count of the said declaration complained against the said defendants of and for a personal trespass therein and thereby supposed to have been committed by the said defendants on, &c. and, to have been from thence continued on divers days and times from and between that day and the day of the commencement of the said suit, when by law they ought to have declared against the said defendants for the said trespasses, if any hath been committed, as having been committed on some certain or stated day, and to have confined and limited the said trespass to that day in particular, and not have continued the same from time to time, and in manner and form as in the said first count is above set forth; and also for that the said defendants cannot either deny, plead to, or justify the matters contained in the said first count of the said declaration, as in the said first count of the declaration is pleaded and set forth; and also for that the said first count of the said declaration is in other respects uncertain, &c.

(1) See a similar form, 5 T. R. 648.

(m) See 6 East, 391, 395.

# •DEMURRERS TO PLEAS IN ABATEMENT.

In the K. B. (or "C. P.")

— Term, — Will. — 4.

And the said plaintiff saith, that the said plea of the said defendant, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to quash the said bill [or "writ,"] and that the said plaintiff is not bound by the law of the land to answer the same. And this he is ready to verify. Wherefore, for want of a sufficient plea in this behalf, the said plaintiff prays judgment, and that the said defendant may answer further to the said declaration, &c.

General demurrer to a plea in abatement (a).

[Same as the above form to the end, and then proceed as follows :]—And the said plaintiff, according to the form of the Statute in such case made and provided, states and shows to the court here, the following causes of demurrer to the said plea, that is to say, that, &c. [Here set out the causes and conclude as follows :]—And also that the said plea is in other respects uncertain, informal, and insufficient, &c.

SPECIAL DEMURRER TO PLEA IN ABATEMENT (b).

For that the said R. by his plea aforesaid, hath admitted himself to be the person named the defendant in and by the aforesaid bill and declaration of him the said plaintiff; and also for that the said plea is in other respects informal and insufficient.

CAUSES OF DEMURRER. To plea in abatement (of misnomer of defendant) beginning "And the said Richard sued by the name of Robert," &c. (c).

For that the said John, otherwise, N. G. in the beginning of his said plea, prayed judgment of the original writ aforesaid, although he hath thereby alleged a matter supposed to be apparent on the face of the said original writ, to wit, that the said original writ was sued out against him by the name of J. L. only, and not by the names of John otherwise N. G. L.; and for that the said John, otherwise N. G., hath, in and by the said plea, alleged a supposed variance between the original writ and declaration aforesaid, without craving oyer of the said original writ, or setting forth the same; and also for that the said plea is double, in this, to wit, that the said John, otherwise N. G., hath thereby alleged a supposed variance between the original writ and declaration aforesaid; and also that he is not, nor at the time of suing the said original writ of the said Jonathan, was or ever before had been called or known by the christian name of John; and also for that the said John, otherwise N. G. hath not, in or by his said plea, stated or alleged his real name, so as to give the said Jonathan a better writ against him the said John, otherwise N. G.; and also for that the said John, otherwise N. G. hath not, in or by

[\*1255] For pleading a variance from the original writ without craving oyer, and for not giving a better writ.

(a) As to the form of this demurrer, and the joinder thereto, see 2 Saund. 210 b, f, g, n. 2, 211, n. 3.—10 Wentw. Index, xxvi. And see infra. See form, 1 Lil. Ent. 4. 12.—Pl. A. 206. If the demurrer be special, the introduction to the causes of demurrer will be the same as in the above special demurrer to a

plea in bar.

(b) A demurrer to a plea in abatement need never assign causes of demurrer, 2 M. & S. 485.

(c) See 5 T. R. 487.—Ante, vol. i. page 490.

CAUSES OF DEMURRER. his said plea, denied, but hath admitted that he is called and known by the name of N. G. L., as by the said declaration is above supposed; and also, &c.

To plea in abatement for beginning. "And the said A. W." when there is no such person named in the declaration, whereas it should have been stated thus, "And A. W. sued by the name," &c. (d).

For that by the said declaration it appears, that the said plaintiff hath brought his action against H. F. and no such person as A. W. is mentioned in the said declaration, and yet the said plea begins with these words, "And the said A. W." which is wholly repugnant to the said declaration; and for that the said plea is not any answer to the said declaration, and is wholly uncertain, &c.

## \*DEMURRERS TO PLEAS IN BAR.

[\*1256] In K. B. (or, "C. P.")

— Term, — Will. 4.

General demurrer to plea in *assumpsit* (a).

And the said plaintiff, as to the said plea of the said defendant, by him [secondly] above pleaded, saith that the same, and the matters therein contained, the manner and form as the same are above pleaded and set forth, are sufficient in law to bar or preclude him the said plaintiff from having or maintaining his aforesaid action thereof against the said defendant, and that he the said plaintiff is not bound by law to answer the same. And this he the said plaintiff is ready to verify. Wherefore, by reason of the insufficiency of the said plea in this behalf, the said plaintiff prays judgment and his damages, by reason of the not performing of the said several promises and undertakings in the said declaration mentioned, to be adjudged to him, &c.

Special demurrer in *assumpsit* (b).

[Same as the above form to the end, and then proceed as follows:]—And the said plaintiff, according to the form of the Statute in such case made and provided, states and shows to the court here, the following causes of demurrer to the said [second] plea, that is to say, that, &c. [Here set out the causes and conclude thus:]—And also that the said [second] plea is in other respects uncertain, informal, and insufficient, &c.

To a plea in *debt* (c).

[General or special demurrer, as in the forms, *supra*, except as to the prayer of judgment, which is as follows:]—Prays judgment and his damages aforesaid, together with his damages by him sustained, on occasion of the detention thereof to be adjudged to him, &c.

To a plea in *covenant* (d).

[General or special demurrer, as in the forms, *supra*, except as to the prayer of judgment, which is as follows:]—Prays judgment and his damages

[\*1257]

(d) See 8 Wils. 514.—Ante, vol. i. page 490. special demurrers, post, 1257 to 1262.

(a) Plead. Ass. 356, 7.

(b) 1 Lil. Ent. 105. See several forms of

(c) 1 Rich. C. P. 197.

(d) See form, Plead. Ass. 342.—1 M. & S. 356.

ges by him sustained on occasion of the said breach of covenant in the said declaration mentioned, to be adjudged to him, &c. TO PLEAS.

[*General or special demurrer, as in the forms, ante, 1256, except as to the prayer of judgment, which is as follows:*—Prays judgment and his damages by him sustained, on occasion of the committing of the said grievances, to be adjudged to him, &c. To a plea in case.

And the said plaintiff saith, that the said avowry [*or "cognizance"*] of the said defendant and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law for the said defendant to avow or acknowledge the taking of the said cattle, in the said declaration above-mentioned, in the said place in which, &c. to be just; and that he the said plaintiff is not bound by law to answer the same. And this he the said plaintiff is ready to verify, wherefore he prays judgment and his damages, by reason of the taking and unjustly detaining of the said cattle, to be adjudged to him, &c. To an avowry or cognizance.

[*General or special demurrer, as in the forms, ante, 1256, except as to the prayer of judgment, which is as follows:*—Prays judgment and his damages by him sustained, on occasion of the committing of the said trespasses, to be adjudged to him, &c. To a plea in trespass.

For that the said defendant had not concluded his said plea by putting himself upon the country, &c. CAUSES OF DEMURRER.

That the defendant has not by his plea traversed or denied, or attempted to put in issue any matter of fact alleged by the plaintiffs, but has introduced, and attempted to put in issue, matters of fact not alleged, nor necessary to be alleged; and that the plea is no answer to the said first count, but evasive and argumentative, &c. For not concluding to the country.

For that the said defendant hath not, in or by his said plea, confessed and avoided, or traversed and denied the making of the several promises and undertakings in the said declaration mentioned; and also for that the said plea is inartificially pleaded, and in other respects uncertain, &c. Demurrer to two pleas to a special action on the case for non-performance of an agreement (e).

That the said plea amounts to the general issue; and that the said defendant, in and by his said plea, hath attempted to put in issue, to be tried by a jury, a matter of right, that is, what sort of wood the said defendant had a right to cut or take for the making, maintaining and supporting of the said fences in the said plea mentioned; and for that the said defendant hath not, in his said plea, set forth what sort of wood the said defendant had a right to cut or take for the purpose in the said plea mentioned; and for that he hath not in his said plea set forth that no such sort of wood was on the said premises, nor hath he set forth Demurrer to a plea of nil debet pleaded to an action of assumpsit.

(e) See the form, in the case of *Jones v. Barkley*, Dougl. 685. (f) See form, vol. xviii. MS. Mr. Justice Ashhurst's Paper Books, 77. That the plea amounts to the general issue, and for putting in issue matter of right, and for not stating a request to plaintiff to assign proper wool, &c. (f).

CAUSES OF  
DEMURREE.

what the custom of the country is with respect to the making, maintaining, and supporting of the said fences in the said plea mentioned, or any custom relating thereto; and for that the said defendant hath not set for in his said plea any request to the said plaintiff to assign proper wood for the purpose in the said plea mentioned; and for that the said plea is in other respects multifarious, defective, &c.

To a plea  
in assump-  
sit on a  
promissory  
note, where  
defendant  
pleaded  
non as-  
sumpsit in-  
fra sex an-  
nos instead  
of actio  
non accre-  
vit infra  
sex annos.  
The like  
in another  
form.

That although the said cause of action, in the said first count of the said declaration mentioned, did not accrue upon the making of the said promise and undertaking in that count mentioned; yet nevertheless the said defendant hath pleaded that he did not undertake or promise within six years next before the suing out of the original writ of the said plaintiffs, instead of pleading that the said cause of action of the said plaintiffs, did not accrue to them within that time; and also, &c.

That although the said causes of action in the said first, second, and third counts mentioned, did not arise or accrue upon the making of the promises and undertakings in those counts mentioned, but on contingencies and on the happening of events which occurred after the making of said promises and undertakings; yet the said defendant, in and by his plea, states, that he the said defendant did not, at any time within six years next before the exhibiting of the bill of the said plaintiff in this behalf, undertake or promise in manner and form as he the said plaintiff hath above thereof complained against him, instead of pleading as to the said first, second, and third counts, that the causes of action therein mentioned, did not accrue within six years.

For plead-  
ing double,  
in the  
county  
court, to  
an action  
of assump-  
sit.  
First, the  
general is-  
sue; sec-  
ondly, that  
the cause

For that the said pleas are double, and contain a two-fold answer to the said declaration, in this, to wit, that the said defendant hath thereby pleaded and alleged, that he did not undertake and promise in manner and form as the said plaintiff hath above thereof complained against him, and also the several causes of action in the said declaration mentioned, did not, nor did any of them, accrue to the said plaintiff at any time within six years next before the date of the said plaintiff's issuing out his original summons in this behalf; and also, &c.

of action did not accrue within six years before issuing out of the original summons.

Demurrer  
to pleas to  
a declara-  
tion in as-  
sumpsit  
(for a wa-  
ger depen-  
ding on a  
foot-race)  
that the  
second  
plea  
amounts to  
the gener-  
al issue,  
and that  
there is no  
matter of  
fact there-  
in in avoid-  
ance of the

For that the said last-mentioned plea, in manner and form as the same is above pleaded, amounts to the general issue, and tends to great and unnecessary prolixity of pleading; and also for that the said defendant hath not, in or by his said last plea, alleged or shown any matter of fact in avoidance of the said agreement, or the said promise and undertaking of the said defendant in the said first count of the said declaration mentioned, but that the said last-mentioned plea consists altogether of matter of law upon which no apt or material issue can be taken, &c. And as to the said plea of the said defendant, by him thirdly above pleaded, as to the said second count of the said declaration, and the said promise and undertaking in that count mentioned, the said plaintiff saith [*same as demurrer to the above plea.*] *Demurrer to fourth plea the same as that to the second, the end, and then proceed.*—And also for that the said defendant hath, and by his said last-mentioned plea, supposed that the several sums of £— and £— were and are mentioned in the said court as intended to be respectively paid by the said E. F. and the said defendant to the



said plaintiff, in the event in that behalf aforesaid, when, in truth and in fact, no sum of £— was or is mentioned, in the said count, nor any sum of money whatsoever, &c.

mentioned in the declaration, and consists wholly of matter of law on which no issue can be taken; and to another plea for supposing a fact not set forth in declaration.

CAUSES OF  
DEMURRER.

agreement

taken; and

Demurrer

to a plea

(of non as-

sumpsit,

except as

to part,

and tender

of that

part) to

debt on

simple

contract.

[\*1260]

For that the said defendant hath not, in or by his said plea, confessed and avoided, or traversed and denied, that he owes to the said plaintiffs the said sum of £— above demanded, or any part thereof; and also for that the said defendant hath, in and by each of his said pleas, tendered an immaterial issue; and also for that the said pleas, although they profess to be and contain an answer to the whole of the said declaration, do not, in truth, contain any answer to the same; and also for that the said pleas are pleaded as if the said declaration had been a declaration upon promises, whereas the same is a declaration in debt; and for that the first of the said pleas denies that the said defendant did undertake or promise, instead of denying that the said defendant was indebted to the said plaintiffs; and for that the second of the said pleas states, that the said defendant was ready and willing to pay the said sum of £— therein mentioned, from the time of making the several promises and undertakings in the said declaration mentioned, as to the said sum of £— instead of stating that he was ready and willing, from the time of his becoming indebted to the said plaintiffs in manner and form as the said plaintiffs have in their said declaration complained against him, &c.

That although the said plaintiff in his declaration hath demanded of and from the said defendant a sum certain, due to him the said plaintiff from the said defendant, by virtue of a writing obligatory under his seal; yet the said defendant hath not, in or by his plea, denied the said writing obligatory to be his deed, nor in any manner shown himself to be discharged therefrom; and also for that the defendant should have pleaded that the said writing obligatory was not his deed, and not that he did not owe the debt demanded; and also for that although the said plaintiff hath demanded the sum of £— yet the defendant hath only pleaded to the said sum of £— above demanded, and hath not traversed, denied, confessed, or avoided the action of the said plaintiff, as to the residue of the said sum of £—; and also, &c.

For pleading *nil debet* to debt on bond, and for not pleading to the whole of the money demanded by plaintiff in his declaration.

For that the said defendants have not, in or by their said plea, denied that there is any such record of the recovery against them the said defendants, at the suit of the said plaintiff remaining in the said court of our said lord the king, before the king himself, as in and by the said first count of the said declaration is above in that behalf alleged; and also for that the said plea, although it professes to be and contain an answer to the second count thereof, yet it in truth contains no answer thereto,

Demurrer to plea of *null tiel record* in C. B. to a declaration on a judgment recovered in K. B. and for money borrowed; for not answering first count properly, and the second not at all.

For that the condition of the said writing obligatory refers to certain articles of agreement to be performed by the said defendant, for the performance of which the said writing obligatory is made and conditioned, but the said defendants have not in their said plea set forth the said articles of agreement, though they have pleaded performance of the matters therein contained generally, but only so much thereof as is recited in the said condition; and also for that the said articles of agree-

To plea (to debt on bond con

CAUSES OF  
DEMURRER.

ditioned  
for perfor-  
mance of  
certain ar-  
ticles of  
agree-

ment) for not setting forth the articles of which defendant pleaded general performance; and for that it does not appear but that the articles might contain negative or disjunctive covenants (g).

[\*1261] That the said fourth plea, in manner and form as the same is above pleaded, is double, in this, to wit, that two several and distinct breaches of covenant are thereby pleaded in bar of the said action of the said plaintiff; and also that the said fourth plea contains several and distinct matters of defense; and also that the said plaintiff cannot take or offer any certain issue upon the said fourth plea; and also that the same fourth plea ought to have concluded to the country, and not with a verification, &c.

with a ver-  
ification -  
instead of  
to the  
country.

For not de-  
nying the  
substantial  
matter in  
the breach  
of cove-  
nant, and  
for offering

For that the said defendant hath, in and by his said plea, put in issue a matter of inference from the fact before alleged; and for that the said defendant hath, in and by his said plea, offered to put in issue matter not properly issuable; and for that the said defendant hath not, in and by his said plea, denied, confessed, or avoided the substantial matter in the said breach of covenant above alleged; and for that the said plea is in various other respects informal, &c.

That de-  
fendant,  
whose es-  
tate is a  
particular  
one, has  
not shown  
who were  
the persons  
seised in  
fee.

For that the said defendant hath not, in or by his said avowry, shown or set forth whether any or what person or persons was or were seised in his, her, or their demesne, as of fee, of or in the said place in which, &c. or under whom the said defendant became or was seised of and in the said place in which, &c. in his demesne as of freehold, for the term of his natural life, nor hath the said defendant, in or by his said avowry, shewn or set forth that any grant or conveyance of the said place in which, &c. was made to the said plaintiff for the term of his natural life, nor how or by what means, or out of what estate the aforesaid estate and interest of the said plaintiff therein commenced or was derived, as he ought to have done, &c.

For that  
defendant  
avows  
taking the  
mare but  
states an-  
other locus  
in quo, and  
avows on  
a posses-  
sory title  
only; nor  
is the  
avowry  
any an-  
swer to the

For that the said avowry avows the taking of the said mare, and yet varies from the declaration of the said plaintiff in relation to the place of taking, whereas, by the laws of this realm, if the said defendant would have denied the place of taking mentioned in the declaration, he should have pleaded the same, by way of plea, in abatement to the said declaration, and then made a suggestion for having a return of the said mare, and also for that the said defendant avows the taking of the said mare upon a possessory title only of the place wherein he alleges the same was taken; and for that the said avowry is no answer to the said declaration, nor does it in any way admit or deny the same; and is pleaded in bar which is wholly repugnant, &c.

[\*1262]  
Demurrer  
to a plea,

For that by the mode of pleading adopted by the defendant in the said

second plea, he the said defendant has unduly attempted to confine the said plaintiff to one cause of action, in respect to the trespasses in the first and last counts of the said declaration mentioned, as to the taking and carrying away the goods and chattels in those counts mentioned, by alleging that those takings and carryings away of those different goods and chattels, were not different takings or carryings away of different goods and chattels, but were the same taking and carrying away the same goods and chattels, and not other or different; and also for that the said defendant, in and by that allegation, hath, with the rest of the matters alleged in the said second plea, justifying the trespasses in the introductory part of that plea mentioned, therein attempted to put in issue two distinctly material and traversable facts; and also for that the said second plea is double and bad for duplicity; and also for that the said second plea is in other respects uncertain, informal, and insufficient.

CAUSES OF  
DEMURRER.for alleging  
that the  
trespasses  
in two  
counts are  
the same  
(A).

## DEMURRERS TO REPLICATIONS, &c.

In the K. B. (or, "C. P." or, "*Exchequer*.")

— Term, — Will. 4.

C. D. }  
ats. }

And the said defendant saith, that the replication of the said A. B. plaintiff, to the said [second] plea of the said defendant, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendant, and that he the said defendant is not bound by law to answer the same; and this the said defendant is ready to verify; wherefore, by reason of the insufficiency of the said replication in this behalf, the said defendant prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

TO REPLI-  
CATIONS,  
&c.General  
demurrer  
to a repli-  
cation.

[*Same as the above to the end and then as follows:*]—And the said defendant, according to the form of the Statute in such cases made and provided, states and shows to the court here the following causes of demurrer in law to the said replication, that is to say, that, &c. [*Here state the causes, and conclude thus:*]—And also, for that the said replication is in other respects uncertain, informal, and insufficient, &c.

Special de-  
murrer to  
a replica-  
tion.

And the said defendant saith, that the said plea in bar of the said plaintiff, to the said cognizance of him the said defendant, and the matters in the said plea in bar contained, are not sufficient in law to bar the said defendant from having a return of the said cattle, and that the said defendant is not bound by law to answer the same, and this the said de-

Demurrer  
to a plea  
in bar to a  
cognizance  
(i).

[\*1263]

(A) That this is objectionable on demurrer,  
see ante, vol. i. 587.—2 Chit. Rep. 291.

(i) See 1 Saund. 349.—8 Wentw. 143. 5  
Wentw. 18.

**TO REPLICATIONS.** defendant is ready to verify. Wherefore by reason of the insufficiency of the said plea in bar in this behalf, the said defendant, as before, prays judgment and a return of the said cattle, goods, and chattels, together with his damages, costs, and charges by him in this behalf expended, according to the form of the Statute in such case made and provided, to be adjudged to him, &c.

To replication to replevin. *This is the same as to a cognizance, only saying "replication" instead of "cognizance," see Plead. Assist. 474.*

**CAUSES OF DEMURRER.** For that the said replication of the said plaintiff attempts to put in issue, to be tried by the country, mere inference and matter of law, viz. whether the said defendant were or were not duly elected mayor, the same replication admitting all the facts and circumstances attending that election, as alleged in the said plea of the said defendant; and also for that the said replication is argumentative, and no certain and sufficient issue can be taken thereon; and that it is also in other respects defective, &c.

For that the said plaintiff hath not, in or by his said replication, taken or tendered any single or material issue out of or upon the said plea of the said defendant by him last above pleaded in bar, but hath stated and put in issue, in his said replication, that the said bill of exchange, in the said first count mentioned, was not made and drawn for the corrupt considerations in the said last plea mentioned, or either of them, whereas every matter and thing stated in the said second plea in any matter relating to the said sum of £— in the said plea mentioned, which is one of the matters stated and relied upon as a consideration in the said replication, was merely stated as inducement, and as a matter upon which no issue was intended to be offered or could be taken; and for that the said plaintiff hath not, in or by his said replication, traversed, or in any manner denied by traverse, or otherwise, the only material fact contained in the plea of the said defendant, by him lastly above pleaded in bar, and upon which any material issue could be taken, namely, whether there was any such corrupt contract and agreement for making and drawing, or in respect of the said bill of exchange in the first count mentioned, which he ought to have done; and for that the said replication is double and confused, in putting in issue two several and distinct matters, namely, whether the said bill of exchange in the said first count mentioned, was given for two illegal considerations, namely, a gambling consideration, and an usurious consideration, whereas the only material fact contained in the second plea of the said defendant was, whether it was given upon a corrupt and usurious consideration, in pursuance of a corrupt and usurious contract and agreement; and for that the said plaintiff hath not, in or by his said replication, traversed, denied, or in any manner put in issue such corrupt contract and agreement, which is the gist and foundation of the defense of the said defendant in that respect, inasmuch as that alone could make the said bill of exchange void in law, or bring it within the meaning and intent of the said Statute in such case made and provided, &c.

[\*1264]

## \*DEMURRER TO REJOINDERS.

[The commencement and conclusion of a demurrer to a rejoinder, is similar in form to a demurrer to a plea, saying, "rejoinder" instead of "plea."—That the said rejoinder is double and multifarious, in this, that it contains two separate and distinct answers, and offers two separate and distinct issues upon the aforesaid replication of the said plaintiff to the said plea of the said defendant, so by him lastly above pleaded in bar, whereas only one issue could or ought to have been offered or taken upon the said replication or upon the matter therein contained; and that the said rejoinder is also double and informal, in this, that it offers to put in issue two distinct and different escapes, whereas the said plaintiff hath originally declared upon, and in his subsequent replication hath supported his said declaration by only one escape, and that according to the rules of good pleading, the said rejoinder should and ought to have been confined to and have concluded with a traverse, which is thereby taken on the said escape so set forth in the said replication of the said plaintiff; yet the said defendant hath very unnecessarily and inartificially extended the said rejoinder to further and other and different matter, by way of supposed second answer to the said replication, whereas only one answer could or ought to have been made to, and only one issue offered or taken upon the said replication, or in or by the said rejoinder; and that the matter so secondly alleged in the said rejoinder, is no answer to the said replication, nor direct or positive denial of the escape therein mentioned, but only an argumentative denial of such escape, whereas the said escape should have been expressly directed, traversed and denied by the said rejoinder; and that the said rejoinder is calculated to occasion the trial of two separate issues upon one and the same fact, and also to introduce a vexatious and unnecessary length of pleading in this cause; and that the said rejoinder is repugnant and informal, in this, that although in one part thereof it considers the said replication and answers the same as being a replication, yet in another part thereof it considers the said replication as being a new assignment, and professes to answer the same accordingly; and that the said rejoinder is in various other respects repugnant, multifarious, inefficient, and informal.]

For duplicity, and being multifarious, in offering two distinct issues upon the replication of the plaintiff (a).

For that the said defendants, in their rejoinder, have not tendered an issue on the fact traversed by the said plaintiff in his said replication; and that the issue, tendered in the said rejoinder, is too large, comprehending not only the fact of the prescription traversed by the replication, but also a matter of fact not alleged or traversed by the said replication, namely, a prescription to dig for stones, &c. in —; and because the said prescription, so attempted to be put in issue, is wholly immaterial and irrelevant in this action, &c.

For not tendering an issue on the fact traversed in the replication (b).

(a) See 1 B. & P. 415.

(b) See 4 T. R. 157.

## \*JOINDERS IN DEMURRER.

**JOINDER.** *In the K. B. (or "C. P.")*

Joinder in demurrer to a declaration or replication in *assumpsit* (a).

A. B. }

agst. }

C. D. }

And the plaintiff saith, that the said declaration, (or "first count," or "replication,")

in manner and form as the same are above stated and set forth, are sufficient in law for him the said plaintiff to have and maintain his aforesaid action thereof against the said defendant, and the said plaintiff is ready to verify and prove the same, as the court here shall direct and award;

wherefore inasmuch as the said defendant hath not answered the said declaration, (or "first count," or "replication,")

nor hitherto in any manner denied the same, the said plaintiff prays judgment and his damages, by reason of the not performing of the said several promises and undertakings in the said declaration mentioned, to be adjudged to him, &c.

*Term, — Will. — 4.*

The like in other actions.

*A joinder in demurrer to a declaration or replication in debt, covenant, detinue, case, or trespass, is precisely similar to the above, except in the prayer of judgment, which is to be according to the form of action, and the same as in the conclusion to the replications, 1262. In replevin, Plead. A. 474.*

Joinder in demurrer to a plea in abatement (b):

And the said defendant saith, that the said plea of the said defendant and the matters therein contained, are sufficient in law to quash the said writ, (or "bill,") and which said plea, and the matters therein contained, the said defendant is ready to verify and prove, as the court here shall direct, &c. wherefore inasmuch as the said plaintiff hath not denied, nor in any manner answered the said plea, the said defendant, as before, prays judgment of the said writ, (or "bill,") and that the same may be quashed, &c.

Joinder in demurrer to a plea in bar in assumpsit, debt, covenant, detinue, case, or trespass.

And the said defendant saith, that his said plea by him [secondly] above pleaded, and the matters therein contained, "in manner and form as the same are above pleaded and set forth, are sufficient in law to bar and preclude the said plaintiff from having or maintaining his aforesaid action thereof against him the said defendant, and the said defendant is ready to verify and prove the same, when, where, and in such manner as the said court here shall direct and award; wherefore inasmuch as the said plaintiff hath not answered the said plea, nor hitherto in any manner denied the same, the said defendant prays judgment, and that the said plaintiff may be barred from having or maintaining his aforesaid action thereof against the said defendant, &c.

Joinder to a demurrer to a plea in bar in replevin (c).

And the said plaintiff saith, that the said plea in bar of the said plaintiff to the said cognizance of the said defendant, and the matters in the said plea in bar contained, are sufficient in law to bar the said defendant from

(a) The like after an imparlance, 2 Lil. Ent. 355.

(b) Plead. A. 308.

(c) See the form, 1 Saund. 349.

having a return of the said cattle, and which said plea in bar, and the matters therein contained, the said plaintiff is ready to verify and prove, as the court here shall direct and award; and because the said defendant hath not answered the said plea in bar, nor in any manner denied the same, the said plaintiff, as before, prays judgment, and damages on occasion of the taking and unjustly detaining the said cattle, to be adjudged to him, &c.

JOINDERS.

\*PROCEEDINGS IN DEBT.

[\*1269]

Ellenborough.

*As yet of Hilary Term, in the 1st year of the reign of King William the Fourth.*

*Witness, Charles, Lord Tenterden.*

Suggestion on judgment in K. B. by default in debt on bond, stating condition and breaches in declaration under stat. 8 & 9 W. 3. c. 11. s. 8, with prayer of writ of inquiry and award thereof.

—, to wit. A. B. puts in his place E. F. his attorney, against C. D. in a plea of debt.

—, to wit. The said C. D. puts in his place G. H. his attorney, at the suit of the said A. B. in the plea aforesaid.

—, to wit. Be it remembered, that on — the — day of —, in this same Term, before our lord the king at Westminster, comes A. B. by E. F. his attorney, and brings into the court of our said lord the king, before the king himself now here, his certain bill against C. D. being in the custody of the marshal of the Marshalsea of our said lord the king, before the king himself, of a plea of debt, and there are pledges for the prosecution thereof, to wit, John Doe and Richard Roe, which said bill follows in these words; that is to say, —, to wit, A. B. complains of &c. [*Here copy the declaration, stating the condition of the bond and breaches verbatim, to the end, omitting pledges, and then proceed on a new line as follows:*]—And the said defendant by G. H. his attorney, comes and defends the wrong and injury, when, &c. and says nothing in bar or preclusion of the said action of the said plaintiff, whereby the said plaintiff remains therein undefended against the said defendant; wherefore the said plaintiff ought to recover against the said defendant his debt aforesaid and his damages, on occasion of the detention thereof (a). And hereupon the said plaintiff, according to the form of the Statute in such case made and provided, prays the writ of our said lord the king to be directed to the sheriff of — and to the right honorable Charles, Lord Tenterden, his majesty's chief justice, assigned to hold pleas in the court of our said lord the king, before the king himself, [*or*] "to his majesty's justices assigned to take the assizes in the said county," commanding the said sheriff that he cause to come before the said chief justice, or before our justices of assize, on —, the — day of — next, at the Guildhall of the city of London, [*or* "at Westminster Hall, in the county of Middlesex,"

[\*1270]

(a) This form of suspending the judgment is advised in 1 Saund. 58, n. 1.—2 Id. 585, 586; and Tidd's Forms, 6th edit. 247. 187 a. n. 2—3 B. & P. 612, and held pro-

per in 3 Dowe, 1; but see Tidd, 9th edit.

PROCEED-  
INGS  
IN DEBT.

or "at the assizes at — in the county of —,"] twelve, &c. by whom, &c. and who neither, &c. to inquire of the truth of the said breaches above assigned, and to assess the damages thereby sustained by the said plaintiff, and also that it may be commanded in the said writ to the said chief justice, [or "justices of assize"] that he [or "they"] make a return thereof to the said court of our said lord the king, before the king himself, at Westminster, on —, the — day of —, and it is granted to him, &c. The same day is given to the said plaintiff at the same place.

The like in  
another  
form (b).

[*The same as the above form, introducing, at the asterisk, the following entry:*]—But because it is convenient and necessary that judgment hereupon should not be given until the truth of the said supposed breaches of the said condition shall have been inquired into, and the damages which the said plaintiff hath sustained by reason of the same breaches shall have been assessed by a jury of the country in that behalf, according to the form of the statute in such case made and provided, let judgment hereupon be stayed until the said premises shall have been ascertained as aforesaid.

The like in  
another  
form.

[*The same as the form, ante, 1269, to the asterisk and then proceed as follows:*]—But because, according to the form of the statute in such case made and provided, a jury ought to inquire of the truth of the said breach of the said condition of the said writing obligatory, above assigned, and to assess the damages that the said plaintiff has sustained thereby, and the said plaintiff having prayed our writ for that purpose, therefore the sheriff of the said county is commanded to summon, &c.—[*Same as the form, ante, 1269, to the end.*]

[\*1271]

*\*As yet of — Term, in the — year of the reign of King William the Fourth.  
Witness, &c.*

The like  
in C. P.

—, to wit. C. D. was summoned to answer A. B. of a plea that he render to the said A. B. the sum of £— which he owes to, and unjustly detains from him, and thereupon the said A. B. by — his attorney, complains, for that whereas, &c.—[*Here set forth the declaration, stating the conditions and breaches verbatim, and then proceed, on a new line as follows:*]—And the said defendant, by — his attorney, comes and defends the wrong and injury, when, &c. and says nothing in bar or preclusion, &c.—[*Proceed precisely as in the forms, ante, 1269 or 1270, to the prayer of the writ of inquiry, and then as follows:*]—And hereupon the said plaintiff prays the writ of our said lord the king to be directed to the sheriff of — and to the right honorable Sir Nicholas Conyngham Tindal, knight, his majesty's chief justice of the Bench here, [or "to his Majesty's justices assigned to take the assizes in the county of —"] commanding the said sheriff, that he cause to come before the said chief justice [or "justices of assize"] on the — day of — next; at, &c. twelve, &c. by whom, &c. and who neither, &c. to enquire of the truth of the said breaches

(b) This form is suggested in 1 Saund. held proper in 8 Dowe, 1; but see Tidd's 58 d, and e, note 1.—3 B. & P. 112, and Forms, 6th ed. 247.



above assigned, to assess the damages thereby sustained by the said plaintiff, and also that it be commanded in the said writ to the said chief justice [or "justices of assize"] that he [or "they"] make a return thereof to the justices here, on — the — day of — next, and it is granted to him, &c. The same day is given to the said plaintiff here, &c.

PROCEED-  
INGS IN  
DEBT.

*Pleas before the barons of the Exchequer at Westminster, among the pleas of the Term of — in the — year of the reign of our Sovereign lord William the Fourth, by the grace of God of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith, and in the year of our Lord 1831.*

The like in  
the Exche-  
quer.

—, to wit. Be it remembered, that heretofore, that is to say, in — Term last past, A. B. debtor of his present majesty, came before the barons of this Exchequer at Westminster, by D. F. his attorney, and brought then here into court, his certain bill against C. D. of a plea of debt, the tenor of which said bill follows in these words:—[*Here copy the declaration and pledges, stating the condition of the bond and breaches, and proceed, on a new line as follows:*—]—And the said defendant in his proper person, comes and defends the wrong and injury, when, &c. and prays the hearing of the bill aforesaid, and it is read to him, &c. which being read and heard, the said defendant saith, that he is not yet advised to answer the said plaintiff in the premises, and prayeth leave to imparl thereunto, until — the first general return of — Term next coming, by which day, &c. and it is granted to him, by the court, the same day is given to the said plaintiff here, &c. at which day come here, as well the said plaintiff by his attorney aforesaid, as the said defendant in his proper person, and the said plaintiff prayeth, that the said defendant may answer him in the premises, and thereupon the said defendant says nothing in bar or preclusion of the said action of the said plaintiff, whereby the said plaintiff remains therein undefended against the said defendant, wherefore the said plaintiff ought to recover his debt aforesaid, together with his damages, by reason of the detention thereof; and hereupon the said plaintiff, according to the form of the statute in such case made and provided, having prayed the writ of our said lord the king, to inquire of the truth of the said breach above assigned, and to assess the damages which the said plaintiff hath sustained thereby, therefore according to the form of the Statute in such case made and provided, the sheriff of — is commanded, that he cause to come before the right honorable Sir William Alexander, knight, chief baron of his majesty's court of Exchequer, [or "before his majesty's justices assigned to take the assizes in the county of —,"] at — in the county of — on — the — day of — instant, twelve honest and lawful men of his bailiwick, to inquire diligently on their oath of the truth of the said breach above assigned, and to assess the damages which the said plaintiff hath sustained thereby; and the said chief baron is [or "justices of assize are,"] commanded that he [or "they"] certify the inquisition to be before him [or "them"] taken to his said majesty's court, before the barons of his said Exchequer at Westminster, on the — day of — instant, together with the names

[\*1272]

PROCEED-  
INGS  
IN DEBT.

of those by whose oath such inquisition shall be taken, and the writ of our said lord the king, to him thereupon directed. The same day is given to the said plaintiff at the same place.

[\*1273] Writ of inquiry, under 8 & 9 W. 8, c. 11, s. 8, where the declaration stated the condition of the bond and breaches, and defendant suffered judgment by default (c).  
 \*William the Fourth, &c. to the sheriff of ———, and to the right honorable Charles Lord Tenterden, our chief justice, assigned to hold pleas in our court before us, [or “to our justices assigned to take the assizes in our county,”] greeting:—Whereas A. B. lately in our court, before us at Westminster, by bill, without our writ, impleaded C. D. being in the custody, &c. of a plea that he should render to him the said plaintiff the sum of £—, which he owed to, and unjustly detained from him, for that whereâs, &c. [*Set forth the declaration, changing the tense, where necessary*] to the damage of the said plaintiff of £—, as he said, and therefore he brought his suit, &c. and such proceedings were thereupon had in our said court before us; that it was afterwards considered by the same court, that the said plaintiff ought to recover against the said defendant his debt aforesaid, together with his damages which he had sustained on occasion of the detention thereof, &c. whereof the said defendant is convicted, as appears to us of record”. And the said plaintiff having prayed our writ to inquire of the truth of the aforesaid breaches of the said condition above assigned, and to assess the damages which he the said plaintiff hath sustained thereby; therefore according to the form of the Statute in such case made and provided, we command you, the said sheriff, that you summon twelve good and lawful men of your bailiwick, to appear before the said right honorable Charles Lord Tenterden, our said chief justice, assigned to hold pleas in our said court, before us, [or “before our said justices of assize,”] on ———, the ——— day of ——— next, at the Guildhall of the city of London, [or “at Westminster Hall, in the county of Middlesex,”] or if at the assizes, [“at ———, in the county of ———,”] to inquire diligently on their oath of the truth of the premises, and to assess the damages which the said plaintiff hath sustained, by reason of the aforesaid breaches, and that you have on that day, before our said chief justice [or “justices of assize,”] this writ. We likewise command our said chief justice, [or “justices of assize,”] that he [or “they,”] certify the inquisition before him [or “them”] taken, to us at Westminster, on ———, the ——— day of ——— next; together with the names of those by whose oath such inquisitions shall be taken, and that he [or “they,”] also have then this writ. Witness, Charles Lord Tenterden, &c.

[\*1274] The like another way.  
 \*William the Fourth, &c., to the sheriff of ———, and to the right honorable Charles Lord Tenterden, greeting:—Whereas A. B. lately in our court, before us at Westminster, by bill, without our writ, impleaded C. D. being in the custody of the marshal of the Marshalsea of our lord the king, before the king himself, of a plea of debt on demand for £—, upon and by virtue of certain articles of agreement, [or “a certain indenture made on, &c. between, &c. whereby, &c. reciting so much of the articles of indenture as is necessary for assigning the breach.”]—And the said plaintiff declared in the said plea that, &c. [*reciting the averments previous to the assignment of the breach.*] And the said plaintiff for assigning a breach

therein, according to the form of the Statute in such case made and provided, said that, &c. [*assigning the breach.*]<sup>PROCEEDINGS IN DEBT.</sup>—And such proceedings were thereupon had, &c. [*as in the preceding form.*]

William the Fourth, &c. to the sheriff of —, and to the right honorable Sir Nicholas Conyngham Tindal, knight, our chief justice of the Bench at Westminster, [*or “to our justices assigned to take the assizes in your county,”*] greeting:—Whereas C. D. was summoned to be in our court, before our justices at Westminster, to answer A. B. of a plea of debt on demand for £—, of good and lawful money of Great Britain, and declared thereupon against the said C. D. for that whereas, &c. [*setting forth the declaration in the past tense.*]<sup>The like in the Common Pleas.</sup>—And such proceedings were thereupon had in our court, before our justices at Westminster aforesaid; that it was afterwards considered by the same court, that the said plaintiff ought to recover against the said defendant his debt aforesaid, and also £— for his damages, by occasion of the detaining of the said debt, whereof the said defendant is convicted. And the said plaintiff having prayed our writ to inquire of the truth of the aforesaid breaches of the said condition of the said writing obligatory above suggested, and to assess the damages which be the said plaintiff hath sustained thereby; therefore, according to the form of the statute in such case made and provided, we command you, the said sheriff, that you summon twelve good and lawful men of your bailiwick, to appear before the said right honorable Sir N. C. Tindal, knight, our chief justice of the Bench at Westminster, &c. [*As ante, 1273, requiring the chief justice or justices of assize, to certify the inquisition* \*1275] to “our justices at Westminster,” instead of “to us,” on a general return-day.]

— to wit. An inquisition indented, taken before me, the right honorable Charles Lord Tenterden, his majesty's chief justice, assigned to hold pleas in the court of our Lord the king, before the king himself, [*or before us, — and — his majesty's justices, assigned to take the assizes in the county of —,*] on —, the — day of —, in the year of the reign of our sovereign lord William the Fourth, by the grace of God, &c. and in the year of our Lord 1830, at — in the county of —, by virtue of his majesty's writ, directed to the sheriff of the said county, and to me the said chief justice [*or “to the said justices of assize,”*] and to this inquisition annexed, by the oath of E. F. &c. twelve good and lawful men of the county aforesaid, who, being sworn and charged upon their oath, say, that, &c.—[*Here set out the finding of the jury upon the breach assigned.*]<sup>Inquisition and return 8 & 9 W. 8, c. 11, s 8 (d).</sup>—And they further say, upon their oath, that the said plaintiff hath sustained damages by the aforesaid breach of the said condition of the said writing obligatory, besides his costs and charges by him about his suit in that behalf expended, to £—. In witness whereof, I, the said chief justice, [*or “we the said justices of assize,”*] have hereunto set my hand and seal, [*or “our hands and seals,”*] the day and year, and at the place above mentioned. \*1276]

The execution of this writ appears in the inquisition hereto annexed.

(d) As to the inquisition, see 1 Saund. 58, notes d. and e. See form, Tidd's Forms, 6th ed. 265.

**PROCEEDINGS IN DEBT.** The answer of — chief justice, [or “of — and — the justices of assize,”] within named.

**Final judgment in K. B. on 8 & 9 W. 3, c. 11, s. 8, after return of inquisition (e).** [*Proceed as in the form in K. B. ante, 1269, in C. P. ante, 1271, or in exchequer, ante, 1271, to the end of the award of the writ of inquiry, and then state the inquisition and final judgment as follows:*]—At which day, before our said lord the king, at Westminster, comes the said plaintiff by his attorney aforesaid, and the said chief justice, [or “justices of assize,”] now here returns [or “return”] a certain inquisition indented, taken before him [or “them,”] at — in the county of — on — the — day of — in the — year of the reign of our said lord the king, upon the oath of twelve good and lawful men of the same county, by which it is found, &c. [*set forth the inquisition:*] and that the said plaintiff hath sustained damages, by reason of the aforesaid breaches of the said condition of the said writing obligatory, to the sum of £5. Therefore it is considered that the said plaintiff do recover against the said defendant his said debt, and also £— for his damages which he hath sustained, as well by reason of the detention of the said debt, as for his costs and charges by him about his suit in this behalf expended, by the court here adjudged to the said plaintiff, and with his assent (f); and it is further considered by his majesty’s court here, that the said plaintiff have execution against the said defendant of the damages aforesaid to — by the said jury in form aforesaid assessed, on occasion of the aforesaid breach of the said condition of the said writing obligatory, according to the form of the “Statute in such case made and provided (g); and the said defendant in mercy, &c.

**Judgment signed the — day of —, A. D. 1831.**

[\*1277] tion of the said writing obligatory, according to the form of the “Statute in such case made and provided (g); and the said defendant in mercy, &c.

**The like in another form, on a bastardy (h).**

[*Proceed as in the forms in K. B. ante, 1269, in C. P. ante, 1271, or in exchequer, ante, 1271, to the prayer of the writ of inquiry, and then proceed as follows:*]—And thereupon the said plaintiffs pray the writ of our lord the king to be directed to the sheriff of the county of S. to summon a jury to appear before the justices of Assize of the county of S. aforesaid, on — the — day of — next, at S. in the county aforesaid, to inquire of the truth of the said breach of the said condition, and to assess the damages which the said plaintiffs have sustained thereby, and it is granted to them, returnable on — the — day of — next, the same day is given to the said plaintiffs here, &c.; and now here at this day, to wit, on — the — day of — come the said plaintiffs aforesaid, by their attorney aforesaid, and the aforesaid justices of assize of the county of S. aforesaid, before whom the inquisition aforesaid has been taken, have sent their record in these words, that is to say, afterwards, on the day and year, and at the place in that behalf within mentioned, that is to say, on — the — day of — in the — year of the reign of our lord the present king, at S. in the county of S. by virtue of this writ, before Sir G. R. knight, one of the justices of our lord the king, of the Bench, and Sir

(e) As to this statement of the return of the inquisition, see Tidd’s Forms, 6th edit. 255.

(f) As to this judgment, see 1 Saund. 58, n. 1.—3 B. & P. 612.—But see Tidd’s Prac. 9th edit. 585.—Tidd’s Forms, 6th edit. 247. The costs are not to be stated as costs of increase, see 2 Saund. 187 d.

(g) This award of execution is sometimes added. See Tidd’s Prac. 9th edit. 585; but it is not necessary, and *quære*, whether it is correct to have any other judgment than for the debt and costs. Tidd’s Prac. 9th edit. 585.—3 B. & P. 607.

(h) See form, 2 Saund. 187 c.

PROCEED-  
INGS  
IN DEST.

S. L. knt. one of the justices of our lord the king, assigned to hold pleas before the king himself, two of the justices of our said lord the king, assigned to take the assizes in and for the within county of S. according to the form of the Statute in such case made and provided; the jurors of the jury, whereof mention is within made, (having been duly summoned in that behalf by the sheriff of the county aforesaid (being called, to wit, W. A. [*here insert the names of the jurors*] come, and are sworn upon the said jury, according to the form of the Statute in such case made, and who, upon their oath, say, that the said writing obligatory within mentioned was made with the condition thereunder written, and within mentioned, and set forth; and that, after the making of the said writing obligatory, the said I. H. in the said condition mentioned, was delivered of a certain child, being the child of which she was pregnant at the time of making the said writing obligatory, and that the said child was born a bastard, within the said parish of C. within mentioned; and that the said defendant hath not, from time to time, and at all times, after the making of the said writing obligatory, fully and clearly indemnified and saved harmless the said churchwardens and their successors, and the parishioners and inhabitants of the said parish, from all costs and charges, by reason of the birth, education, and maintenance of the said child, according to the form and effect, and the true intent and meaning of the said condition, but, on the contrary thereof, had wholly neglected and omitted so to do; and the said churchwardens, overseers, parishioners, and inhabitants, had on account of the said neglect and omission of the said defendant, and in order to preserve the life and health of the said child, been obliged to lay out and to expend, and had actually laid out and expended, a large sum of money for sundry costs and charges, which were necessarily incurred by reason of the birth of the said child, and its education and maintenance during a long time then elapsed, and have thereby sustained damages; and the jurors aforesaid, upon their oaths aforesaid, do assess the damages which the said plaintiffs have sustained thereby to, £9 9s. &c. Therefore, &c. [*Judgment as in the preceding form.*]

[\*1278]

[*Same as the form, ante, 1269, to the asterisk, except that the declaration sets forth a bond, but not the condition or breach.*] And hereupon the said plaintiff, according to the form of the Statute in such case made and provided, suggests and gives the court here to understand and be informed, that the said writing obligatory, in the said declaration mentioned, was made and given by the said defendant under and subject to a certain condition thereto subscribed; whereby, after reciting to the effect following, that is to say, that, &c.—*Here state the recitals, either verbatim or in the past tense, according to the substance*—it was declared that the condition of the said writing obligatory was such, that if, &c. [*state condition verbatim to the proper tense*]*—as by the said writing obligatory, reference being thereunto had, will fully appear. Nevertheless the said plaintiff for assigning a breach of the said condition of the said writing obligatory, according to the form of the Statute in such case made and provided, suggests and gives the court here to understand and be informed, that, &c.—[State the breaches according to the facts, and which may be as ante, 440 to 468.]—And the said plaintiff for assigning a further breach*

Judgment and suggestion on 8 & 9 W. 3, c. 11, by default, where breach of condition not stated in declaration.

[\*1279]

PROCEED-  
INGS  
IN DEBT.

of the condition of the said writing obligatory, according to the form of the Statute in such case made and provided, further suggests and gives the court here to understand and be informed, that, &c.—[*State second and subsequent breaches, according to the facts.*] And hereupon the said plaintiff prays the writ of our said lord the king to be directed, &c.—[*Proceed precisely as ante, 1269.*]

The like in  
a mort-  
gage bond,  
or bond to  
perform  
covenants,  
in another  
indenture  
(i).

[*Proceed as in the form, ante, 1269*] to the asterisk, except that the declaration states the bond, but not condition or breach.]—And hereupon the said plaintiff, according to the form of the statute in such case made and provided, suggests and gives the court here to understand and be informed, that the said writing obligatory, &c. [*as in the last to the end of the recital of the condition.*]—And the said plaintiff further suggests and gives the court here to understand and be informed, that in and by the said indenture of release, mentioned and referred to in the said condition of the said writing obligatory, the said defendant, for the consideration therein mentioned, did grant, &c. to have and to hold, &c. but subject nevertheless to a certain proviso, condition or agreement, for the redemption of the said premises, being the proviso or condition mentioned and referred to in and by the said condition of the said writing obligatory in that behalf, whereby it was provided, &c. [*reciting the proviso*] and the said defendant did thereby covenant, &c. [*here set forth the covenant for payment of the mortgage money*] (k). And for breach of the said condition of the said writing obligatory, the said plaintiff, according to the form of the Statute in such case made and provided, further suggests and gives the court here to understand and be informed, that the said defendant did not, nor would well and truly pay or cause to be paid unto the said plaintiff, the sum of £— and interest, in the said condition of the said writing obligatory mentioned, on the said, &c. next ensuing the date of the said writing obligatory, or at any time before or afterwards, according to and in full discharge of the said proviso or condition mentioned and referred to in and by the said condition of the said writing obligatory, and according to the form and effect of the same condition, and wholly neglected and refused so to do, and therein failed and made default, and the said sum of £— together with a certain other sum of money, to wit, &c. as and for the interest thereof, is still wholly due and unpaid to the said plaintiff, contrary to the form and effect of the said condition of the said writing obligatory, to wit, at, &c. aforesaid; and hereupon the said plaintiff prays the writ, &c. [*as in the preceding form.*]

Writ of in-  
quiry in K.  
B. on the  
stat. 8 & 9  
W. 3,  
where de-  
fendant  
suffered  
judgment  
by default  
to declara-

William the Fourth, &c. to the sheriff — and to the right honorable Charles Lord Tenterden, our chief justice assigned to hold pleas in our court before us, [*or* “to our justices assigned to take the assizes in your county,”] greeting:—Whereas A. B. lately in our court, before us, at Westminster, by bill, without our writ, impleaded C. D. being in the custody of the marshal of the Marshalsea, before us, of a plea of debt on

(i) See form in Tidd's Forms, 6th edit. 249.  
—See also the like form in debt on annuity bond in the Exchequer, with entry of satisfaction, Tidd's Forms, 6th edit. 250.

(k) It would seem sufficient merely to state the covenant, without stating either the proviso or habendum.

demand for £— of good and lawful money of Great Britain, upon and by virtue of a certain writing obligatory, in the penal sum of £— bearing date, &c. and sealed with the seal of the said defendant, and such proceedings were thereupon had in our said court, before us, that it was afterwards considered by the same court that the said plaintiff ought to recover against the said defendant his debt aforesaid, together with his damages which he had sustained on occasion of the detention thereof, &c. whereof the said defendant is convicted, as appears to us of record; and thereupon the said plaintiff, according to the form of the statute in such case made and provided, suggested upon the roll whereon the said judgment so recovered against the said defendant as aforesaid is entered, to the effect following, to wit, that the said writing obligatory, whereon the said judgment was so recovered against the said defendant as aforesaid, was made and given by him the said plaintiff, under and subject to a certain condition thereto subscribed, whereby, after reciting, &c. (*stating the recital, if any, preceding the condition of the "bond"*) it was declared that if, &c. [<sup>\*1281</sup>] (*reciting the condition;*) and the said plaintiff further suggested, on the said roll whereon the said judgment so recovered against the said defendant was and is so entered as aforesaid, that, &c.—[*Here state the suggestion of the breaches to a prayer of a writ of inquiry, and proceed as follows:*]—As we have received information from the said plaintiff in our court before us; and the said plaintiff having prayed our writ to inquire, &c.—[*Proceed the same as in the writ of inquiry in K. B. ante, 1273, to the end.*]

PROCEED-  
INGS  
IN DEST.

tion on  
bond, not  
stating  
condition  
or breach.

William the Fourth, &c. To the sheriff of — and to the right honorable Sir Nicholas Conyngham Tindal, knight, our chief justice of the Bench at Westminster, [or "to our justices assigned to take the assizes in your county,"] greeting:—Whereas C. D. was summoned to be in our court, before our justices, at Westminster, to answer A. B. of a plea of debt on demand for £— of good and lawful money of Great Britain, upon and by virtue of a certain writing obligatory, in the penal sum of £— bearing date, &c. and sealed with the seal of the said defendant; and such proceedings were thereupon had in our said court, before our justices, at Westminster aforesaid, that it was afterwards considered by the same court that the said plaintiff ought to recover against the said defendant his debt aforesaid, and also £— for his damages by occasion of the detaining the said debt, whereof the said defendant is convicted; and thereupon the said plaintiff, according to the form of the Statute in such case made and provided, suggested, &c.—[*As to the above; to the prayer of the writ of inquiry, and then as follows:*]—And the said plaintiff having prayed our writ to inquire, &c.—[*Proceed to the end, the same as in writ of inquiry, in C. P. ante, 1274.*]

The like  
in C. P.

[*To the end of the demurrer book, and then as follows:*]—At which day, before our said lord the king, at Westminster, come the parties aforesaid, by their attornies aforesaid, whereupon all and singular the premises being seen, and by the court of our said lord the king now here fully understood, and mature deliberation being thereupon had, it appears to the said court here that the said plea, in manner and form aforesaid, by the said plaintiff

Judgment  
on demur-  
rer to a  
replication  
in debt on  
bond, with  
suggestion

PROCEED-  
INGS  
IN DEBT.

and pray-  
er, on writ  
of inquiry  
on stat 8  
& 9 W. 8,  
c. 11, s. 8  
(l).

above "in reply pleaded, and the matters therein contained, are sufficient in law for him the said plaintiff to have and maintain his aforesaid action thereof against the said defendant, wherefore the said plaintiff ought to recover his said debt together with his damages, on occasion of the detention thereof (m); and hereupon the said plaintiff, according to the form of the Statute, &c. says that the said writing obligatory, in the said declaration mentioned, was made and given by the said defendant under and subject to a certain condition thereto subscribed, whereby, after reciting, &c. it was declared, &c.; and the said plaintiff further saith, &c. [suggesting the breaches of the condition] (n); and hereupon the said plaintiff, &c.—[Proceed with the prayer of the writ of inquiry to the end, as ante, 1272.]

The like in  
another  
form (o).

[To the end of the demurrer book, and then as follows :]—Whereupon all and singular the premises being seen, and by the court here more fully understood, and mature deliberation being thereupon had, for that it appears to the court here, that the plea by the said defendant in form aforesaid above pleaded, is not sufficient in law to bar the said plaintiff from having his said action thereof maintained against the said defendant, it is considered, that the said plaintiff ought to recover his said debts and his damages on occasion of the detention of the said debt, and his costs and charges by him about his suit in that behalf expended; but because it is convenient and necessary that judgment hereof should not be given until the truth of certain breaches of covenant hereafter suggested shall be inquired into, and the damages which the said plaintiff has sustained by reason of those breaches shall be assessed by a jury of the country in that behalf, let judgment hereof be stayed until such time as the said premises shall be ascertained as aforesaid; and hereupon the said plaintiff, according to the form, &c. [Here suggest the breaches.] And because, according to the form of the state in such case made and provided, a jury ought to inquire of the truth of the breaches above assigned, and to assess the damages that the said plaintiff has sustained thereby, therefore the sheriff of the said county is commanded, &c.—[Proceed to the end, the same as ante, 1272.]

The like in  
another  
form,  
where the  
breaches  
were as-  
signed in  
the decla-  
ration or  
replication  
and final  
judgment  
is stayed,  
until after  
the dama-  
ges have  
been as-  
sessed (p).

[As in the last, to the end of the finding of the court, that the replication is sufficient in law, and then as follows :]—Wherefore the said plaintiff ought to recover against the said defendant his said debt, together with his damages by him sustained on occasion of the detention thereof, &c. But because it is convenient and necessary that judgment should not be given hereupon, until the truth of the aforesaid breaches of the said condition of the said writing obligatory above assigned shall have been inquired into, and the damages which the said plaintiff hath sustained thereby, shall have been assessed by a jury of the country in that behalf, according

(l) See another form, 1 Saund. 58, note 1 d.

(m) In 1 Saund. 58, note 1 d.—3 B. & P. 612, this form is recommended; and see 8 Dow. 1; but see Tidd's Prac. 9th ed. 584, 585, and Tidd's Form, 6th edit. 802, where it is said, that judgment is to be as at common law.

(n) See forms of breaches, as ante, 440 to

463. If the breaches, &c. were suggested in the declaration, this suggestion is to be omitted.

(o) See 1 Saund. 58 d.—3 B. & P. 612.

(p) See form, 1 Saund. 58, n. 1.—Tidd's Forms, 6th ed. 804, and notes to the last form and see 8 Dow. 1.



to the form of the Statute in such case \*made and provided, therefore let judgment hereupon be stayed in the meantime; and the said plaintiff having prayed the writ of our said lord the king to be directed, &c.—  
[*Proceed with the prayer and award of the writ of inquiry, as ante, 1272, to the end.*]

PROCEED-  
INGS.  
IN DEBT.

Ellenborough.

*As yet of — Term, in the — year of the reign  
of King William the Fourth.*

*Witness, Charles Lord Tenterden.*

Judgment  
on issue on  
nul tiel re-  
cord and  
suggestion  
of breach-  
es, which  
were not  
assigned  
in declara-  
tion or re-  
plication.

*Middlesex*, to wit. A. B. puts in his place — his attorney, against C. D. in a plea of debt.

*Middlesex*, to wit. The said C. D. in person, at the suit of the said A. B. in the plea aforesaid.

*Middlesex*, to wit. Be it remembered, that on — the — day of — in this term, before our lord the king at Westminster, comes A. B. by — his attorney, and brings into the court of our said lord the king, before the king himself, now here, his certain bill against C. D. gentleman, one, &c. of a plea of debt, and there are pledges for the prosecution thereof, to wit, John Doe and Richard Roe, which said bill follows in these words, that is to say, *Middlesex*, to wit. A. B. complains, &c. [*Here copy the paper book to the end.*]

At which day, before our said lord the king, at Westminster, comes the said plaintiff by — his attorney aforesaid, and the said defendant, although solemnly demanded in open court to appear and produce the said record, by him above in pleading alleged, cometh not nor produceth the same, but therein wholly fails and makes default, wherefore the said plaintiff ought to recover against the said defendant his damages by occasion of the premises; and hereupon (q) the said plaintiff, according to the form of the Statute \*in such case made and provided, says, that the said writing obligatory was made and given, under and subject to a certain condition thereunder written, whereby it was declared, &c. [*\*1284*]  
[*Here set out the condition of the bond.*]—And for assigning a breach of the said condition of the said writing obligatory, according to the form of the Statute in such case made and provided, the said plaintiff suggests and gives the court here to understand and be informed, that after the making of the said writing obligatory, to wit, on, &c. the said sum of £— of lawful money of Great Britain, so payable on that day as aforesaid, and interest from the date thereof, became and was due and owing from the said defendant to the said plaintiff, and still is in arrear and unpaid contrary to the form and effect of the said condition of the said writing obligatory; and for assigning a further breach of the said condition of the said writing obligatory, according to the form of the Statute in such case made and provided, the said plaintiff suggests and gives the court here to understand and be informed, that after the making of

(q) If the condition and breach have been suggested in the declaration or replication, the suggestion will be here omitted, and the entry proceed at once with the prayer of inquiry.

PROCEED-  
INGS  
IN DEBT.

Prayer of  
inquiry  
and award  
thereof.

Continu-  
ance.

[\*1285]

Issue and  
suggestion  
of breach-  
es after  
plea *non  
est factum*,  
on the stat.  
8 & 9 W. 3,  
c. 11, s. 8,  
with award  
of *venire*,  
*tam ad tri-  
andum*,  
*quam ad-  
inquiren-  
dum* (r).

the said writing obligatory, to wit, on, &c. the further sum of £—  
like lawful, &c. being the said second instalment in the said condition  
mentioned, became and was due and owing from the said defendant,  
the said plaintiff, and still is in arrear and unpaid, contrary to the form  
and effect of the said condition of the said writing obligatory; and hereupon  
the said plaintiff prays a writ to be directed to the sheriff of —  
and to the right honorable Charles Lord Tenterden, his majesty's chief  
justice, assigned to hold pleas in the court of our said lord the king  
before the king himself, commanding the said sheriff that he cause  
come before the said chief justice, on, &c. next, at Westminster, in the  
county of Middlesex, twelve, &c. and who neither, &c. to inquire of the  
truth of the said breaches above assigned, to assess the damages there  
sustained by the said plaintiff; and also that it may be commanded  
the said writ to the said chief justice, that he make a return thereof.  
the said court of our said lord the king, before the king himself,  
Westminster, on — the — day of — next, and it is granted  
him, &c. the same day is given to the said plaintiff, at the same place.  
At which day, before our said lord the king at Westminster, comes  
the said plaintiff, by his attorney aforesaid, and the said writ of our  
lord the king to the said sheriff and chief justice in that behalf directed  
hath not been returned, nor hath any thing been done thereupon, there-  
fore, as before, the said plaintiff prays another writ of our said lord  
the king to be directed to the sheriff of — and to the right honorable  
Charles Lord Tenterden, his majesty's chief justice, commanding  
the said sheriff that he cause to come before the said chief justice, on —  
— day of — next, at Westminster, [*same as before, Continuance*  
*to Easter term—Continuance to Trinity Term—Continuance to Mich-*  
*mas Term—Continuance to Hilary Term, 1830, same as before.*]  
which day, &c.—[*Here state the return of the inquisition and final judg-*  
*ment, as ante, 1276.*

[*After the plea of oyer of bond and condition and non est factum,*  
*similiter, proceed as follows:*]—and hereupon the said plaintiff prays  
the said writing obligatory in the said declaration mentioned may be en-  
rolled, and the same is accordingly enrolled in these words, to wit, [*here*  
*out the obligatory part of the bond verbatim.*] He also prays, that  
condition of the said writing obligatory may be enrolled, and the same  
accordingly enrolled in these words, to wit: Whereas, &c.—[*Here state*

(r) See Tidd's Forms, 6th edit. 281. This is  
proper in K. B. 8 T. R. 255, in which it was  
decided, that in debt on bond, after oyer of the  
condition, and *non est factum* pleaded, and  
issue joined thereon, the plaintiff may enter a  
suggestion of breaches. See also 2 Saund. 187  
a; and 2 New Rep. 362; but in 5 Taunt. 886.  
—1 Marsh. 95, it was held, that in debt on  
bond, conditioned for the performance of cove-  
nants, if the defendant craves oyer and pleads  
performance of each covenant specially, and  
also general performance, the plaintiff must  
assign breaches in his replication, if he has  
not done it in his declaration; and if he merely

takes issue on the general performance,  
enters a separate assignment of breaches  
the record, no damage can be assessed  
thereon, and the court will award a reply.  
The preferable course is in general to  
the condition and breach in the declaration.  
Saund. 58, note 1.—2 Id. 188 a, note  
*quare* this now; see ante, vol. i. pages 61.  
It is better to assign the breaches in the  
caption. It is quite clear they may be assigned,  
though they cannot be assigned as well-  
gested, in the replication, see 2 New Rep.  
2 Saund. 187, a, 5th edit.

the condition of the bond, beginning with the recital, if any.] And for a breach of the said condition of the said writing obligatory, the said plaintiff, according to the form of the statute in such case made and provided, suggests, and gives the court here to understand and be informed, that, &c. assigning the breach and concluding as follows :—Therefore, to try the said issue above joined between the said parties ; and in case the said issue shall be found for the said plaintiff, to inquire of the truth of the said breach of the form aforesaid above assigned, and to assess the damages sustained thereby (s), let a jury thereupon come before our lord the king, at Westminster, on — the — day of — next, by whom, &c. and who, either, &c. to recognize, &c. because as well, &c. the same day is given to the parties aforesaid, at the same place.

PROCEED-  
INGS  
IN DEBT.

[\*1286]

[To the end of the similiter to defendant's plea, and then as follows :—] And thereupon the said plaintiff, according to the form of the Statute in such case made and provided, suggests, and gives the court here to understand and be informed, that the said writing obligatory in the said declaration mentioned, was and is subject to a certain condition thereunder written whereby, after reciting, that whereas, &c. [setting out the whole of the recitals carefully] the condition of the said writing obligatory was declared to be such, that if, (&c. then, &c. otherwise, &c.) nevertheless for assigning breaches of the said condition of the said writing obligatory, the said plaintiff in fact saith, that, &c. [setting out the breach of the condition as in debt on bond,] contrary to the form and effect of the said writing obligatory, and of the condition thereof, and to the damage of the said plaintiff of £—; therefore, according to the form of the Statute in such case made and provided, let a jury thereupon come before our lord the king, at Westminster, on — the — day of — next, by whom, &c. and to neither, &c. because, &c. as well to try the said issue above joined between the said parties, as to enquire of the truth of the matters by the said plaintiff above suggested, and to assess what damages the said plaintiff hath sustained by reason of the said breaches of the said condition of the said writing obligatory, the same day is given to the parties aforesaid at the same place, &c.

The like in  
another  
form (t).

[At the end of the replication to non est factum, or special plea of fraud, proceed thus :—] And hereupon the said plaintiff for assigning a breach of the condition of the said writing obligatory in the said first plea mentioned, and with intent to recover his damages by him sustained upon occasion thereof, according to the form of the Statute in such case made and provided, suggests, and gives the court here to understand and be informed, that the said defendant did not nor would well and truly pay,

[\*1287]

(s) This is the issue when the proceedings are by bill; when by original, instead of the words between brackets, say, "the sheriff is commanded that he cause to come before the king on, &c. wheresoever our said lord the king shall then be in England, twelve, by whom, and who neither, &c. to recognize, &c. because as well, &c. the same day is given to the parties aforesaid." See Tidd's Law, 6th edit. 278.

(t) See the preceding form and notes.

(u) As to this form, see 5 Taunt. 886. 1 Marsh. 95, according to which decisions, if the defendant pleaded performance, the breach must be assigned in the replication, and not suggested; but if the plea were of matter collateral to the performance, it should seem that the breach of the condition may be suggested, 2 Saund. 186, 7.—8 T. R. 255.

Suggestion of breach of condition which has been before set out in declaration or plea, with award of venire, to try issue, ascertain truth of breaches, and assess damages (u).

PROCEED-  
INGS  
IN DEBT.

or cause to be paid, unto the said plaintiff, the said yearly rents or sum of £—, as in the said condition mentioned; but, on the contrary thereof after the making of the said writing obligatory, to wit, on, &c. a certain large sum, &c. became and was due from the said defendant to the said plaintiff, and still is due and unpaid, contrary to the form of the said writing obligatory, and the said condition thereof, to wit, at, &c. (*venue*) aforesaid, therefore, according to the form of the Statute in that case made and provided, let a jury come before, &c. by whom, &c. and who neither, &c. because, &c. as well to try the issue above joined between the said parties, as to inquire of the truth of the matters by the said plaintiff above suggested, and to assess what damages the said plaintiff hath sustained by reason of the said breach of the condition of the said writing obligatory, the same day is given to the said parties aforesaid, at the same place, &c.

Another form, where the breach of the condition is stated in the declaration or replication (*w*). Judgment after verdict and assessment of damages on stat 8 & 9 W. 3, c. 11, s. 8 (*x*).

[\*1288]

Mercy.

*The form of the issue is as above, except that the condition of the bond and breach are stated in the declaration, or in the replication, and after the similitur, or other issue joined, then proceed with the award of the venire, as well to try the issue, as to inquire the truth of the breach, and assess the damages as in the preceding form.*

Therefore it is considered, that the said plaintiff do recover against the said defendant his said debt and his damages aforesaid, on occasion of the detention thereof, to 1s. together with his costs and charges aforesaid, 40s. being "by the said jury in form aforesaid assessed, and also £— his said costs and charges, by the court of our said lord the king, before the king himself now here adjudged of increase to the said plaintiff, and with his assent; it is also considered by his majesty's court here that the said plaintiff have execution against the said defendant of the damages aforesaid, to £— by the said jury, in form aforesaid assessed, on occasion of the aforesaid breach of the said condition of the said writing obligatory, according to the form of the Statute in such case made and provided. And the said defendant in mercy, &c.

Suggestion of three further breaches to be entered on the roll, in order to found *scire facias* for such further breaches (*y*)

[At the end of the judgment, ante, 1276, proceed as follows:]—Afterwards, to wit, on — the — day of — in — Term, in the — year of the reign of our said lord the king, before our said lord the king at Westminster, comes the said plaintiff, by J. D. his attorney, and according to the form of the Statutes in such case made and provided, gives the same court here to understand and be informed, that the bill of him the said plaintiff in the said action in which he so obtained such judgment aforesaid, was exhibited upon the — day of — in — Term, in — year of the reign of our said lord the king, and that the said action was brought and commenced upon and for certain breaches of the condition of the said writing obligatory by the said defendant before the exhibiting the bill aforesaid; and the said plaintiff, for further and other breaches of the said condition of the said writing obligatory, according to the form of

(w) See the notes to the form, ante, 1285.

(x) There seems to be no occasion for this judgment, that plaintiff have execution, &c.

(y) In the older edition of Tidd's Forms,

there is a form nearly similar to the above, in the latter editions it is omitted. It also seems that the *scire facias* may be issued the first instance. See 8 & 9 W. 3, c. 11, s.

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statute in such cases made and provided, gives his said Majesty's court here to understand and be informed, that after the recovery of the said judgment, to wit, on the — day of — in the year of our Lord — at Westminster, in the county of Middlesex, a large sum of money, to wit, the sum of £30 6s. 1d. of lawful money of Great Britain, of the said instalments or sums of money in the said condition of the said writing obligatory mentioned, being the said third instalment, together with interest thereon became and was due and payable from the said defendant to the said plaintiff, and which [ \*1289 ] said last-mentioned sum of £30 6s. 1d. and interest thereon as aforesaid, are still due and owing, and in arrear and unpaid from the said defendant to the said plaintiff, contrary to the form and effect of the said condition of the said writing obligatory ; and also, that after the recovery of the said judgment, and in the life-time of the said defendant, to wit, on the — day of — in the year of our Lord —, at Westminster aforesaid, in the county aforesaid, a large sum of money, to wit, the sum of £30 6s. 1d. of lawful money of Great Britain, being the fourth instalment or sum of money in the said condition mentioned, together with interest thereon, became and was due and payable from the said defendant to the said plaintiff, and which said last-mentioned sum of £30 6s. 1d. and interest as aforesaid are still due, in arrear and unpaid from the said defendant to the said plaintiff, contrary to the form and effect of the said condition of the said writing obligatory ; and also, that after the recovery of the said judgment, to wit, on the — day of — in the year of our Lord —, at Westminster aforesaid, in the county aforesaid, a large sum of money, to wit, the sum of £30 6s. 1d. of lawful money of Great Britain, being the fifth instalment or sum of money in the said condition mentioned, and interest thereon as aforesaid became and was due and payable from the said defendant to the said plaintiff, and which said last-mentioned sum of £30 6s. 1d. and interest as aforesaid are still due, in arrear, and unpaid from the said defendant to the said plaintiff, contrary to the form and effect of the said condition of the said writing obligatory ; which said three last-mentioned breaches of the said condition so assigned, the said plaintiff doth aver, and doth give his said Majesty's court here to understand and be informed, are further and other breaches of the said condition than the said breaches, for and by reason of which he obtained the said judgment, so by him recovered as aforesaid ; and hereupon the said plaintiff, according to the form of the Statute in such case made and provided, prays the writ of our said lord the king, of *scire facias*, upon the said judgment so obtained as aforesaid against the said defendant, to be directed to the said sheriff of Middlesex, suggesting the said further and other breaches of the said condition of the said writing obligatory hereinbefore assigned, and commanding the said sheriff to summon the said defendant to show cause why execution should not be had and awarded upon the said judgment for the damages which the said plaintiff hath sustained, by reason of the said further and other breaches of the said condition of the said writing obligatory, and it is granted to him, &c. returnable before our said lord the king at Westminster, on — the — day of — next, the same day is given to the said defendant at the same place. [ \*1290 ]

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INGS ON  
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Writ of  
*scire facias*  
thereon,  
viz. *scire*  
*facias* for  
three fur-  
ther  
breaches  
of condi-  
tion, of the  
bond on  
which  
judgment  
had been  
obtained  
(z).

[\*1291]

William the Fourth, by the grace of God, of the United Kingdom of Great Britain and Ireland, king, defender of the Faith, to the sheriff of Middlesex, greeting:—Whereas T. V. heretofore, to wit, in — Term, in the — year of our reign, in our court before us at Westminster, by bill, without our writ, and by the judgment of the same court, recovered against defendant, gentleman, one of the attorneys of the court of our lord the king, a certain debt of £350, and also £32 0s. 4d. for his damages which he had sustained, as well by reason of the detaining of the said debt, as for his costs and charges by him about his suit in that behalf expended, whereof the said defendant was convicted, as by the record and proceedings thereof, remaining in our said court before us at Westminster aforesaid, manifestly appears, which said judgment so recovered against the said defendant as aforesaid, was had and obtained, upon a certain writing obligatory, bearing date the — day of — in the year of our Lord — and sealed with the seal of the said defendant, whereby the said defendant became held and firmly bound to the said plaintiff in the said sum of £350, to be paid to the said plaintiff when he the said defendant should be thereunto afterwards requested, with and under a certain condition in the said writing obligatory subscribed, whereby, after reciting, &c. [*state recitals*] it was declared that if the said defendant and E. F. or either of them, their, or either of their heirs, executors, or administrators, did and should well and truly pay or cause to be paid, unto the said plaintiff his executors, administrators, or assigns, the sum of £181 16s. 6d. with lawful interest after the rate of £5 per cent. per annum for the same, in manner following, that is to say, the sum of £30 6s. 1d. and interest from the date thereof, on the — day of — then next ensuing, and the like sum of £30 6s. 1d. and interest from the date thereof, at the end of twelve calendar months, from the date thereof, and the like sum of £30 5s. 1d. and interest from the date thereof, at the end of the next succeeding six calendar months, until the whole of the said sum of £181 16s. 6d. and interest as aforesaid, should be fully paid and satisfied, without fraud, or further delay, then the said obligation was to be void, or otherwise to be and remain in full force and virtue; and whereas the said plaintiff heretofore suggested a certain breach of the said condition of the said writing obligatory, according to the form of the Statute in such case made and provided, to wit, that after the making of the said writing obligatory, to wit, on the — day of — in the year of our Lord — the said sum of 30£ 6s. 1d. of lawful money of Great Britain, so payable on that day as aforesaid, and interest from the date thereof, became and was due and owing from the said defendant to the said plaintiff, and was in arrear and unpaid contrary to the form and effect of the said condition of the said writing obligatory; and also a further breach of the said condition of the said writing obligatory, according to the form of the Statute in such case made and provided, that is to say, that after the making of the said writing obligatory (to wit) on the — day of — in the year of our Lord — aforesaid, the further sum of £30 6s. 1d. of like lawful money of Great Britain, being the said second instalment in the said condition mentioned, became and was due and owing from the said

(z) See another form of a writ of *scire facias* debt on articles of agreement, Id. 536, and the *facias* for further breaches on annuity-bond, like in the Exchequer on the annuity-bond, Tidd's Forms, 6th edit. 534; and the like in after former *scire facias*, Id. ib.

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INGS ON  
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defendant to the said plaintiff, and was in arrear and unpaid, contrary to the form and effect of the said condition of the said writing obligatory, and damages were thereupon assessed for and by reason of the breaches assigned. And whereas it hath been, and is duly suggested by the said plaintiff, in our said court before us, as other and further breaches of the said condition of the said writing obligatory, than the said breaches so suggested as aforesaid, that after the recovery of the said judgment, to wit, on the — day of — in the year of our Lord — at Westminster, in your county, a large sum of money, to wit, the sum of £30 6s. 1d. [*Same as the statement of the further breaches in the suggestions, but instead of saying "in the county aforesaid," say, "in your county;"*] and also for that, &c. [*As ante, 1289, in the suggestion of the second further breach, with the same exception.*]—And that after the recovery of, &c. [*same as ante, 1288.*] For which said three last-mentioned breaches of the aforesaid condition of the said writing obligatory the said plaintiff hath humbly besought us. to provide him a proper remedy, \* and we, \* being willing that what is just in this behalf should be done, do, according to the form of the Statute in such case made and provided, command you, that by honest and lawful men of your bailiwick, you make known to the said defendant that he be before us at Westminster, on — the — day of — next, to show cause why execution should not be had and awarded against him upon the said judgment so obtained as aforesaid, for the damages to be assessed by reason of the said last-mentioned breaches of the said condition of the said writing obligatory, if it shall seem expedient for the said defendant so to do, and further to do and receive what our said court before us shall then and there consider of him in this behalf, and have there then the names of those by whom you shall so make known to him, and this writ. Witness, Charles Lord Tenterden, at Westminster, the — day of — in the — year of our reign.

[\*1292]

— Term, — Will.

Middlesex, to wit. Our lord the king sent to his sheriff of Middlesex his writ closed, in these words, to wit, William, &c.—[*Here copy the preceding writ, and then proceed as follows:*]—At which day, before our lord the king, at Westminster, comes the said plaintiff by C. D. his attorney, and the sheriff, to wit, O. M. esq. and T. C. M. esq. sheriff of the said county, returned to our said lord the king, that the said defendant had not any thing in his bailiwick whereby he could give him notice as by the said writ he was commanded, nor was the said defendant found in the same, and that the said defendant comes not, but makes default; therefore, as before, it was commanded to the said sheriff, that by honest and lawful men of his bailiwick, he should make known to the said defendant that he should be before our said lord the king, at Westminster, on — the — day of — next, to show, in form aforesaid, why, &c. and further, &c. the same day was given to the said plaintiff there, &c. at which said day, before our said lord the king, at Westminster, comes the said plaintiff by his said attorney, and the sheriff, as before, returneth that the said defendant had not any thing in his bailiwick whereby he could give him notice as by the said writ he was commanded, nor was the said defendant found in the same; and the said defendant being solemnly demanded, comes in his

Declaration thereon, where defendants appeared to second scire facias.

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JUDGMENT.

[\*1293] own proper person, and hereupon the said plaintiff prays that execution may be adjudged to him against the said defendant, upon the said judgment so obtained as aforesaid, for the damages to be assessed by reason of the said last-mentioned "breaches of the said condition of the said writing obligatory, &c.

[*N. B. The defendant suffered judgment by default, whereupon the following writ of inquiry was issued.*]

Writ of in-  
quiry  
thereon,  
defendant  
having  
suffered  
judgment  
in *scire  
facias*.

William the Fourth, by the grace of God, of the United Kingdom of Great Britain and Ireland, king, defender of the Faith, to the sheriff of Middlesex, and to the right honorable Charles Lord Tenterden, our chief justice, assigned to hold pleas in our court before us, greeting :—Whereas A. B. heretofore, in — Term, in the — year of our reign, in our court before us, at Westminster, by bill, without our writ, and by the judgment of the same court, recovered against C. D. gentleman, one of the attorneys of the court of our lord the king, a certain debt of £350 and also £32 0s. 4d. for his damages which he had sustained, as well by reason of the detaining of the said debt, as for his costs and charges by him about his suit in that behalf expended, whereof the said defendant was convicted, as by the record and proceedings thereof, remaining in our said court before us, at Westminster aforesaid, manifestly appears ; which said judgment so recovered against the said defendant as aforesaid, was had and obtained upon a certain writing obligatory, bearing date the — day of — in the year of our Lord, — &c. &c. [*Same as in the writ of scire facias from the bracket ante, 1290, to the asterisk, ante, 1291, and then proceed as follows :*—And such proceedings were thereupon had in our said court before us, that it was afterwards considered in and by the same court, that the said plaintiff ought to have execution against the said defendant upon the same judgment, for the damages to be assessed, by reason of the said three last-mentioned breaches of the said condition of the said writing obligatory, as appears to us of record, and thereupon the said plaintiff, according to the form of the Statute in such case made and provided, having prayed our writ to inquire of the truth of the said three last-mentioned breaches of the said condition of the said writing obligatory, and to assess the damages which he had sustained thereby ; therefore, according to the form of the Statute in such case made and provided, we command you the said sheriff, that you summon twelve good and lawful men of your bailiwick to appear before the said right honorable Charles Lord Tenterden, our said lord chief justice, assigned to hold pleas in our said court before us, on — the — day of — next, "at Westminster Hall, in your county of Middlesex, to inquire diligently on their oath of the truth of the premises, and to assess the damages which the said plaintiff hath sustained, by reason of the said last-mentioned breaches, and that you have on that day before our said chief justice this writ. We likewise command our said chief justice that he certify the inquisition before him taken to us, at Westminster, on — the — day of — next together with the names of those by whose oath such inquisition shall be taken, and that he also have there then this writ. Witness, Charles Lord Tenterden, at Westminster, on the — day of — in the — year of our reign.

[\*1294]



*Middlesex*, to wit. An inquisition indented, taken before the right honorable Charles Lord Tenterden, chief justice of our lord the king, assigned to hold pleas before the king himself, at a sitting of *nisi prius*, holden before the said chief justice, at Westminster Hall, in the great hall of pleas there, in and for the said county, on — the — day of — A. D. — by virtue of the king's writ hereunto annexed, by the oath of, &c. [*here enumerate twelve jurors*] twelve good and lawful men of the bailiwick of the sheriff of the said county, who having been duly summoned to appear before the said chief justice, at the sitting aforesaid, and having accordingly appeared, and been sworn to inquire the truth of the breaches in the said writ set forth, and to assess the damages, costs and charges in that behalf, upon their oath say, that the several matters in the said writ alleged, are true, and that the said plaintiff hath sustained damage by occasion thereof, to the amount of the sum of £99 18s. 3d. over and above his costs and charges by him about his suit in that behalf expended, and for those costs and charges to 40s. In witness whereof, as well the said chief justice as the jurors, have hereunto set their hands, the day and year first above written.

PROCEED-  
INGS ON  
JUDGMENT.  
Inquisition  
thereon.

By the Court.

For increased costs £30 1 9

	£99 18 3
<i>S. Le. Blanc.</i>	2 0 0
	30 1 9
	<hr/>
	£132 0 0

Damages in the whole.  
10th April, 1830.

\*As yet of — Term, in the — year of the reign of [*\*1295*]  
*King William the Fourth.*  
Witness, Charles Lord Tenterden. Final judgment thereon.

*Middlesex*, to wit.—Our lord the king sent to his sheriff of *Middlesex* his writ, closed in these words, that is to say, William the Fourth.— [*Here copy the first sci. fa. to the end, verbatim, then proceed, in a fresh line, as follows :*]

At which day before our said lord the king, at Westminster, comes the said plaintiff by J. L. his attorney, and the sheriff, to wit, C. M. esq. and T. C. M. esq. sheriff of the said county, returneth to our said lord the king, that the said defendant hath not anything in his bailiwick whereby he can give him notice, as by the said writ he is commanded, nor is the said defendant found in the same; and the said defendant comes not, but makes default, therefore, as be before, it is commanded to the said sheriff, that by honest and lawful men of his bailiwick, he make known to the said defendant that he before our lord the king at Westminster, on — the day of — next to show, in form aforesaid, why, &c. and further, &c. the same day is given to the said plaintiff there, &c. at which day, before our said lord the king, at Westminster, comes

PROCEED-  
INGS ON  
JUDGMENT.

[\*1296]

Judgment  
signed, &c.

Mercy.

the said plaintiff by his said attorney and the sheriff, as before, returneth, that the said defendant hath not anything in his bailiwick whereby he can give him notice, as by the said last-mentioned writ he is commanded, nor is the said defendant found in the same; and the said defendant being solemnly demanded, comes, in his own proper person, and hereupon the said plaintiff prays that execution may be adjudged to him against the said defendant upon the said judgment so obtained as aforesaid, for the damages to be assessed, by reason of the said last-mentioned breaches of the said condition of the said writing obligatory, &c.; and the said defendant says nothing to bar or preclude the said plaintiff from having execution adjudged to him against the said defendant upon the said judgment so obtained as aforesaid, for the damages to be assessed by reason of the said last-mentioned breaches. Wherefore the truth of the breaches last aforesaid, and the damages thereby sustained, ought to be ascertained and assessed according to the form of the Statute aforesaid, by the default of the said defendant, and hereupon the said plaintiff prays the writ of our said lord the king, to be directed to the sheriff of Middlesex, \*and to the right honorable Charles Lord Tenderden, his majesty's chief justice, assigned to hold pleas in the court of our said lord the king, before the king himself, commanding the said sheriff, that he cause to come before the said chief justice, on — the — day of — next, at Westminster-hall, in the county of Middlesex, twelve good, &c. by whom, &c. who neither, &c. to inquire of the truth of the said last-mentioned breaches above assigned, and to assess the damages thereby sustained by the said plaintiff, and also that it be commanded in the same writ to the said chief justice, that he make a return thereof to the said court of our said lord the king, before the king himself, at Westminster, on — the — day of — next, and it is granted to him, &c. the same day is given to the said plaintiff at the same place. At which day, before our said lord the king, at Westminster aforesaid, comes the said plaintiff by his attorney aforesaid, and the said chief justice now here, returns a certain inquisition indented, taken before him, at a sitting of *nisi prius* holden before the said chief justice, holden at Westminster-hall, in the great hall of pleas there, in and for the said county, on — the — day of — in the — year of the reign of our said lord the king, by the oath of twelve good and lawful men of the bailiwick of the sheriff of the said county, by which it is found, that the several matters in the said writ alleged and assigned as aforesaid, are true, and that the said plaintiff hath sustained damage by occasion thereof, to the amount of the sum of £99 18s. 3d. over and above his costs and charges by him about his suit in that behalf expended, and for those costs and charges to 40s. Therefore, it is considered, that the said plaintiff do have execution against the said defendant for his damages aforesaid, by the said inquisition in form aforesaid assessed, and also £30 1s. 9d. for the costs and charges of this suit, by the court of our said lord the king now here adjudged, of the increase to the said plaintiff, and with his assent, which said damages, costs, and charges, in the whole, amount to £132. And the said defendant in mercy, &c.

# •DECLARATIONS, PLEAS, &c. IN ACCOUNT.

In the Common Pleas.

— Term, — Will. 4.

London; (to wit.)—A. S. was summoned to answer to W. S. in a plea that she render to the said W. S. a reasonable account for the time during which she was bailiff to the said W. S. in the parish of [St. Botolph, Bishopsgate Street,] in the [city of London]. And thereupon the said W. S. by — his attorney, saith, that whereas, heretofore, to wit, on the — day of —, in the year of our Lord —, and from thence for a long space of time, to wit, hitherto, the said plaintiff was lawfully possessed of one undivided moiety or half part, the whole in moities to be divided [or if the plaintiff was seised in fee, say, “the said plaintiff was seised in his demesne as of fee, of and in one undivided, &c.”] of and in a certain messuage, with the appurtenances, situate, &c. for the rest and residue of a certain term, to wit, the term of six years, commencing, &c. with the said defendant, during all that time held the said tenement, with the appurtenances, together with the said plaintiff, as tenants in common or if the seisin was in fee, say, “and the said defendant and divers other persons whose names are to the said plaintiff unknown, during all that time held the said tenements with the appurtenances, together with the said plaintiff, as tenants in common;”] and the said defendant had also, during all that time, the care and management of the whole of the said premises with the appurtenances, to receive and take the rents, issues, and profits thereof, and as bailiff of the said plaintiff, of what she received more than her just share and proportion thereof to render a reasonable account thereof to the said plaintiff, and his said share thereof, when the said defendant should be thereunto afterwards requested, according to the form of the Statute, &c.; and although the said defendant during the time aforesaid, at, &c. (venue) aforesaid, received more than her just share and proportion of the rents, issues, and profits of the said tenements with the appurtenances, and the said plaintiff’s share thereof, that is to say the whole of the rents, issues, and profits of the said tenements with the appurtenances; yet the said defendant, although she was afterwards, to wit, on, &c. at, &c. (venue) aforesaid, requested by the said plaintiff so to do, hath not yet rendered a reasonable account to the said plaintiff of the said rents, issues, and profits so received as aforesaid, or either of them, or any part thereof, or of the said share of the said plaintiff, or any part thereof, but hath hitherto wholly neglected and refused so to do, contrary to the form of the Statute in that case made and provided, to wit, at, &c. (venue) aforesaid; and whereas also the said defendant, heretofore, to wit, on the day and year aforesaid, and from thence for a long space of time, to wit,

Declaration by one tenant in common against his co-tenant, for not accounting; first count stating defendant to have been tenant in common (a).

[\*1298]

Second count against de-

(a) See commencements, ante, 12, 17; and forms of declarations, pleas, &c. 1 Went. 81, and id. Index, Account. As to the law, see Bac. Ab. Account.—Selw. N. P. Account.—Willen’ Rep. 208. 3 Wooddes. 83, 5 Taunt. 431.—1 Marsh. 115. S. C. 2 Campb. 238.—Tidd.

9th edit. 1, 2.—See a declaration and proceedings in account, relative to goods or personal property, 3 Wils. 78 to 94. As to the appointment of auditors, 2 Chit. Rep. 10.—Tidd, 9th edit. 2.

PROCEED-  
INGS IN  
ACCOUNT.

defendant as  
bailiff of a  
moiety, not  
disclosing  
that defend-  
ant was ten-  
ant in com-  
mon  
(b).

hitherto, at the parish aforesaid, was bailiff to the said plaintiff, of one undivided moiety or share of certain other messuages, tenements, and premises, to wit, &c. situate and being at the parish aforesaid, and the said defendant, during all the time last aforesaid, as such bailiff, took and received the rents, issues, and profits of the said last-mentioned tenements, with the appurtenances, to render a reasonable account thereof to the said plaintiff when she should be thereunto requested; yet the said defendant, although she was afterwards, to wit, on, &c. at, &c. (*venue*) aforesaid, requested by the said plaintiff so to do, hath not as yet rendered a reasonable account to the said plaintiff of the said last-mentioned rents, issues, and profits so received as aforesaid, or either of them, or any part thereof, but hath hitherto wholly neglected and refused so to do, contrary to the form of the Statute aforesaid, to wit, at, &c. aforesaid, wherefore the said plaintiff says he is injured, &c.—[*Common conclusion in C. P.*]

Orpwood

ats.

Pleas to  
first count  
of declara-  
tion simi-  
lar to the  
above  
form, that  
defendant  
was not  
bailiff, &c.  
(c).

[1299]

Second  
plea, that  
defendant  
did not re-  
ceive more  
than his  
just share  
of the  
rents, &c.

Third plea,  
that he has  
fully ac-  
counted.

Featherston and wife. } And the said defendant by — his attorney, comes and defends the wrong and injury when, &c. and as to the said cause of action in the said [first] count of the said declaration mentioned, the said defendant says, that the said J. and E. (*actio non*).—Because he says, that the said defendant never had the care and management of the said premises with the appurtenances, in the said [first] count of the said declaration mentioned, or any part thereof, to receive and take the rents, issues, and profits thereof, or as bailiff of the said J. and E. his wife, in right of the said E. of what he received more than his just share and proportion thereof, to render a reasonable account to the said J. and E. and their said share thereof, when he the said defendant should be thereunto afterwards requested, in manner and form as the said J. and E. his wife, have in the said first count of the said declaration above alleged, and of this the said defendant puts himself upon the country, &c. And for a further plea in this behalf as to the said supposed cause of action in the said first count of the said declaration mentioned, the said defendant, by leave of the court here, for this purpose first had and obtained, according to the form of the Statute, &c. says, that the said J. and E. his wife. (*actio non*).—Because he says, that he the said defendant did not receive more than his just share and proportion of the rents, issues, and profits of the said premises with the appurtenances, in the said first count of the said declaration mentioned, and the said J. and E.'s share thereof, in manner and form as the said J. and E. have in the said first count of the said declaration above alleged, and of this also the said defendant puts himself upon the country, &c. And for a further plea in this behalf as to the said cause of action in the said first count of the said declaration mentioned, the said defendant, by leave, &c. says, that the said J. and E. (*actio non*).—Because he says, that after the time during which the said J. is in the first count of the said declaration alleged to have had the care and management of the said premises with the appurtenances in the said first count mentioned, to receive and take the rents, issues, and profits thereof, and as

(b) See Willes' Rep. 208, 210.

(c) See forms of pleas, &c. in account, 3

Wils. 73 to 118.—1 Went. 88, and the Index at the end of that volume.

bailiff of the said J. and E. to render such account as therein mentioned, to wit, on, &c. at, &c. aforesaid, he the said defendant fully accounted with the said J. and E. concerning the said time, and the said rents, issues, and profits in the said first count of the said declaration mentioned, and their said share thereof, and this, &c. therefore, &c. And as to the said cause of action in the said last count of the said declaration mentioned, the said defendant says, that the said J. and E. (*actio non.*)—Because he says, that the said defendant never was bailiff to the said J. and E. of the said part or share of the said premises with the appurtenances, in the said last count of the said declaration mentioned, or any part thereof, nor ever took or received the rents and profits of the said premises with the appurtenances, in the said last count of the said declaration above alleged, and of this also the said defendant puts himself upon the country, &c. And for a further plea in this behalf, as to the said supposed cause of action in the said last count of said declaration mentioned, the said defendant by like leave, &c. says, that the said J. and E. (*actio non.*)—Because he says, that after the time during which the said defendant is therein supposed to have been the bailiff of the said J. and E. as in the said last count is mentioned, and as such bailiff to have taken and received the rents and profits therein mentioned, to wit, on the — day of —, in the year of our Lord —, to wit, at, &c. aforesaid, he the said defendant fully accounted with the said J. and E. concerning the said time, and the said rent, issues, and profits received, as in the said last count is mentioned, and this he is ready to verify; and therefore he prays judgment if the said J. and E. ought to have or maintain their aforesaid action thereof against him, &c.

PROCEED-  
INGS IN  
ACCOUNT.

Fourth  
plea to  
last count,  
that defend-  
ant never  
was bailiff,  
and took  
the rents,  
&c.

["1300"]  
Fifth plea,  
to last  
count, that  
he had ful-  
ly account-  
ed.

## \*PROCEEDINGS IN DOWER.

[\*1311]

*Essex* (to wit.)—Command C. D. that justly and without delay he render to A. B. widow, who was the wife of E. B. her reasonable dower, which falleth to her out of the freehold which was of the said E. B. late her husband, in the parish of E. [or "parishes of E. F. and G."] whereof she has nothing, as she says.

*Præcipe*  
for writ of  
dower (a)

Returnable on —  
William the Fourth, by the grace of God, of the United Kingdom of Great Britain and Ireland, king, defender of the Faith, to the sheriff of [*Essex*,] greeting:—Command C. D. that justly and without delay he render to A. B. widow, who was the wife (c) of E. B. now deceased, her

Writ of  
dower (b).

(a) See form and directions, 2 Saund. 48, note 1; 2 Sel. Prac. 1st ed. 294; 2d ed. 202, and Com. Dig. Pleader, 2 Y. 1.

(b) Booth, 66.—Fitz. Nat. Brev. 9th edit. 148.—See the forms in 2 Saund. 48, and 10 Wentw. 157.

(c) It is said to be necessary to insert these  
VOL. III.

words, and where the writ was:—"Command A. that, &c. he render to E. F. her reasonable dower, which falleth to her of the freehold, which was of B. F. late her husband," &c. an objection was taken to the writ, because it was not "Command A. that, &c. he render to E. F. who was the wife of B. F." &c. for she

PROCEED-  
INGS IN  
DOWER.

reasonable "dower which falleth to her of the freehold, which was of the said E. B. her late husband, in the parish of E. [or "parishes of E. F. and G."] whereof she hath nothing as she says, and whereof she complains that the said C. D. deforceth her, and unless he shall so do, and if the said A. B. shall give you security to prosecute her claim, then summon by good summoners the said C. D. that he be before our justices of the Bench, at Westminster, on, &c. [a *general return day*,] to show wherefore he hath not done it, and have there the summoners and this writ. Witness ourself at Westminster, the — day of — in the — year of our reign.

Pledges to prosecute, { John Doe,  
and  
Richard Roe.

Summoners, John Venn,  
and  
Richard Fenn. } John Herbert, esq. sheriff.

Writ of  
dower  
where the  
widow has  
married  
again (d).

William the Fourth, &c. to the sheriff [Yorkshire,] greeting:— Command T. P. that justly and without delay he tender to A. B. and M. his wife (which said M. was formerly the wife of C. H. deceased), the reasonable dower of her the said M. which belongs to her of the freehold tenements which were of the said G. H. formerly her husband, at S. in your county, whereof she hath nothing as they say, and whereof they complain that the said T. P. doth unjustly deforce them, and unless, &c.

Warrant of  
sheriff  
thereon (e).

J. W. esquire, sheriff of [Essex] to E. N. and O. P. my bailiffs for this time only, greeting:—By virtue of a writ of dower of our lord the king *unde nihil habet*, to me directed, I command you, that you command C. D. that justly and without delay he render to A. B. who was the wife of E. B. her reasonable dower, which, &c. (*as in the writ*) deforceth her; and unless he shall do it, then summon the said A. B. that he be before our justices at Westminster on — to show "wherefore he will not do it," and that after the said summons is made, you do, at the most usual door of the parish church of the parish of E. on Sunday next after the said summons, immediately after divine service is ended, proclaim the same

[1818]

ought to be named wife of B. F. in the beginning of the writ, it being the name by which she has any claim to dower, the court held the objection fatal, and that the omission was not supplied by the subsequent words, "*of B. F. her husband*," &c.—Cro. Jac. 217.—2 Saund. 43, note 1.—the writ of dower should be brought against all the tenants of the freehold, i. e. the persons claiming a freehold interest, and not mere tenants having a chattel interest. It is issued by the curiaitor. The first process thereon is a summons by the sheriff or his officia, which may be either served upon the tenants personally, or left at their houses or lands, demanded by the writ. In the latter case it is usual to set up a white stick or wand upon the premises; and by statute 31 Eliz. c. 3, proclamation must be made at the door of

the parish church on Sunday, fourteen days at least before the return of the writ. The tenants being summoned, either cast an *essoin*, or appear or make default. If they cast an *essoin* the defendant must adjourn it till the 4th return after. If they appear at the return of the writ of summons, or upon the adjournment of the *essoin*, the demandant then counts. But if they make default, a *great cape* issues to seize the lands, and warns the tenants to appear to excuse their default, which, if they do, or the demandant release him, he shall count; but otherwise he shall have final judgment, 2 Saund. 43, note 1.

(d) This writ was framed by a very eminent pleader; see another form, Booth, 168.

(e) See form, 2 Saund. 43, note 1.

summons according to the form of the statute (f) in such case made and provided. Given under the seal of my office, &c.

PROCEEDINGS IN DOWER.

By virtue of his majesty's writ of dower *unde nihil habet*, to the sheriff of [Essex] directed, and by virtue of the said sheriff's warrant to us directed, we do hereby require and command you, that you render to A. B. &c. (as in the writ) as she alleges and complains that you the said C. D. keep her out of the same, and if you refuse so to do, then we do hereby summon you that you be and appear before his majesty's justice, at Westminster, on — to show cause why you do not.

Summons thereon (g).

Received 1st Jan. 1831.

Pledges of prosecution, { John Doe,  
and  
Richard Roe.

Summoners of the with- { T. N.  
in named A. B. and  
J. S.

And after the aforesaid summons made, to wit, at the most usual door of the parish church of E. within specified, "within which the tenements within mentioned do lie, upon the Lord's day, to wit, the — day of — in the year of our Lord — immediately after divine service and sermon in the said church was ended, I made proclamation of the aforesaid summons, according to the form of the Statute in such case made and provided.

Sheriff's return to writ of dower (h).  
[1814]

J. W. esq. sheriff.

William the Fourth, &c. take into our hand by the view of good and lawful men of your county, the third part of [two messuages, one hundred acres of land, ten acres of meadow, and five acres of wood, with the appurtenances,] in the parish of E. in your county, which A. B. in our court, before our justices at Westminster, claims, as the dower of her the said A. B. of the endowment of J. B. her late husband, against C. D. by our writ of dower *unde nihil habet*, for the default of him the said C. D. and the day of the taking thereof make known to our justices at Westminster, by your letters under seal, and summon by good summoners the

(f) 31 Eliz. c. 8, s. 2.

(g) See form, 2 Saund. 48, note 1.—2 Sel. Prac. 1st ed. 295; 2d ed. 203; and 1 Taunt. 265.

(h) See form, 2 Saund. 48, n. 1. 2 Sel. Prac. 1st ed. 295; 2d ed. 203. and Furnis v. Waterhouse, 1 Mod. 197. It must appear on the return, that the land lies within the parish where the proclamation of the summons was made, and that the proclamation was made near the summons, *ibid.* Where the lands lie in several parishes or townships, it seems that a proclamation made at the church or chapel of one parish or township is sufficient within the act, 31 Eliz. c. 8, s. 2.—Hob. 138. But a return that the sheriff had proclaimed "the contents of the writ," is sufficient,

because he must proclaim that he made summons on the land, *ibid.* However, according to the modern practice, it seems sufficient to return "that the sheriff made proclamation of the said summons according to the form of the Statute, &c." On the return of the summons, the tenant is entitled to an *essoign*, which is entered in the office of the clerk of the essoigns of the C. B. upon the day of such return; but it cannot be entered as if made by attorney, for it is inconsistent to say, that a man has a legal excuse for not appearing when he does really appear by attorney, 2 Wills. 164.

(i) See 2 Saund. 48, n. 1.—10 Wentw. 286, 7.—2 Sel. Prac. 1st ed. 295, 6; 2d ed. 203; and Com. Dig. Pleader, 2 Y. 1.

PROCEED-  
INGS IN  
DOWER.

said C. D. that he be before our justices at Westminster, on — to answer and show wherefore he was not before our justices at Westminster, on — according as he was summoned [but when the default is not *appearing on the adjournment day of the essoign*, then say, "wherefore he did not keep the day given him, by reason of his essoign,"] before our justices at Westminster, on — last passed, and have there the names of those by whose view you should do this, and this writ (*k*). Witness — Lord — at Westminster, the — day of — in the — year of our reign."

[\*1315] "By virtue of this writ to me directed, on the — day of — in the year within written, I have taken into the hands of our lord the king, by the view of O. P. and Q. R. good and lawful men of my county, the third part of the lands and tenements within mentioned, with the appurtenances, as I am within commanded, and I have by T. N. and J. S. given notice to the within mentioned A. B. to be and appear (*m*) before his majesty's justices at Westminster, at the time and place within mentioned, as I am also within commanded. Summoners of the within named A. B., T. N., and J. S.

J. W. esq. sheriff.

Plaint or  
count in  
dower (*l*).

*Essex* (to wit.)—A. B. widow, who was the wife of E. B. esq. deceased by — her attorney, demands against C. D. the third part of [ten messuages, ten barns, ten stables, four gardens, four orchards, one water corn mill, two thousand acres of land, two hundred acres of meadow, thousand acres of pasture, two thousand acres of manor, and two hundred acres of woodland,] with the appurtenances, in the parish of — in the county of Essex, as the dower of the said A. B. of the endowment of the said E. B. deceased, heretofore her husband, whereof she hath nothing, &c.

The like  
by wife  
and her  
second  
husband.

*Yorkshire* (to wit.)—M. F. and M. his wife (which said M. was formerly the wife of G. S. deceased,) by — their attorney, demand against T. P. the third part of [one undivided moiety of fourteen messuages, fourteen out-houses, fourteen yards, fourteen gardens, and two acres of land,] with the appurtenances, — in the county of York, as the reasonable dower of the said M. by the endowment of the said T. P. formerly her husband, by the writ of our lord the now king of dower, whereof she hath nothing, &c.

[\*1316] "Breconshire (Ss.)—S. W. widow, who was the wife of T. W. L. L. and H. M. who are admitted by the court of our lord the king

The like  
by an infant (*o*).

(*k*) If the sheriff do not return the writ, the demandant must sue out an *alias grand cape* at the return of the first writ; the form of the entry of the *grand cape* and *alias*, when the tenant makes default at the return of the summons, is in *Rast. Ent.* 239 a, pl. 4.

(*l*) See 2 Saund. 43, n. 1; and 2 Sel. Prac. 1st edit. 298; 2d edit. 204.

(*m*) If the tenant neglect to appear on the return of the *grand cape*, the demandant is strictly entitled to judgment of seisin, and to an award of writ of inquiry of damages; but

if the tenant appear on the return of the *grand cape*, the demandant, instead of insisting upon final judgment against the tenant for his default to the summons may waive the default and take an appearance upon the *grand cape*, and so in *petit cape*, 1 Salk. 216, 217.—6 Mod. 4.—2 Saund. 43, n. 1.

(*n*) See forms, 2 Wils. 118.—Morg. Pres. 582.—2 Saund. 44, 329.—Booth, 118, 166.—Lil. Ent. 189.—10 Went. 157. Id. Index, 166. 165.—Com. Dig. Pleader, 2 Y. 2.

(*o*) See forms, 2 Saund. 44, 329.



here to prosecute for the said S. who is within age, as her next friends, demands against J. W. a (p) third part of [the manor of C. and R. and of fourteen messuages, two water corn-grist mills, five hundred acres of land, sixty acres of meadow, one hundred acres of pasture, one hundred acres of wood, two hundred acres of furze and heath] with the appurtenances, and [eighty shillings of rent in L., B., and C.,] as her dower of the endowment of the said T. her late husband, &c.

PROCEED-  
INGS  
IN DOWER.

And the said W. by H. B. who is admitted by the court of the king here to defend in this behalf for the said W. who is under the age of twenty-one years, as the guardian of the said W., cometh and saith, that from the death of the said J. late husband of the said M. he hath been always ready, and still is ready, to render to the said M. her dower of the said tenements and premises, with the appurtenances, and rendereth the same here in court to the said M.

Plea by  
defendant  
by guardi-  
an, that he  
was al-  
ways ready  
to render  
dower (q).

And the said C. D. by — his attorney, comes and says, that the said A. B. ought not to have her dower of the manors, tenements, and rents aforesaid, with the appurtenances and advowsons aforesaid of the endowment of the said E. B. heretofore her husband, because he says, that the said E. B. heretofore her husband, was not, either on the day on which he married the said A. B. or ever after, seised of such estate of and in the said manors, tenements, and rents, with the appurtenances and advowson aforesaid, whereof, &c. that he could endow the said A. B. thereof, and of this he puts himself upon the country, and the said A. B. doth the like. Therefore, &c.

Plea ne  
unques  
seisis que  
(r).  
[ \*1317 ]

And the said C. D. by — his attorney, comes and says, that the said A. B. ought not to have her dower in this behalf, as having been the wife of the said E. B. deceased, because he says, that the said A. B. never was accoupled to the said E. B. deceased, in lawful matrimony, and this the said E. D. is ready to verify, and therefore he prays judgment if the said A. B. ought to have her dower of the messuages and tenements aforesaid, with the appurtenances.

Plea ne  
unques ac-  
couple (s).

And the said A. B. by the said — her attorney aforesaid, says, that

Replica-  
tion that  
they were

(p) After the demandant has counted, it is held in many cases that the tenant may pray a view, Co. Ent. 177 a.—Rast. Ent. 228 b, 282 b, 239 b.—Clift. Ent. 299.—3 Lev. 169.—Whelpdale v. Whelpdale, ibid. 220.—Barnes v. Rich. But Dyer, 179, a, pl. 41.—2 Inst. 481.—3 Fitz. View, 55.—2 Lev. 117.—Astenal v. Astenal, are to the contrary. It is probable that the strong inclination of the court would be to discountenance, if not disallow, the plea, being dilatory, as it necessarily occasions great delay in a demand much favored in law, and the widow is in the meantime without any support, 2 Saund. 44, n. 8.

(q) See form, 1 Rich. Prac. C. P. 4th edit. 437, 8, and proceeding thereon. As to the use of this plea, see 2 Sel. Prac. 2d. edit. 210.—Co. Lit. 81.

(r) See 2 Saund. 229.—1 Rich. Prac. C. P. 4th edit. 440.—2 Wils. 118.—Morg. Prec. 582, 583, 584.—10 Wentw. 159, 60.—Booth, 167.—Rast. Ent. 230 a, s. 10, Dower.—Co. Ent. 176 a, Dower.—Hearne, 340, Dower.—Rob. Ent. 237.—1 Bro. Ent. 203.—Clift. Ent. 203, pl. 12. Proof by demandant that her deceased husband was in the receipt of rents and profits, is *prima facie* evidence of a sufficient seisin, 10 Wentw. 160, 1. See other pleas, 2 Saund. 44 and 45, n. 1.—Booth, 157, &c.—10 Wentw. Index, 164, 5.

(s) See form, 2 Wills. 118.—Morg. 582, 10 Wentw. Prec. 168.—2 Hen. Bla. 145; see the law, and forms of pleas and certificate referred to, in 2 Saund. 44, 45, n. 1.—Rast. Ent. 228 a, 228 b.—Co. Ent. 180 a, b.—Rob. Ent. 240.—1 Bro. Ent. 204.

PROCEED-  
INGS IN  
DOWER.

lawfully  
married in  
England  
(t).

she ought not by any thing in the plea of the said C. D. above alleged, to be barred from having her aforesaid dower in this behalf, because she says, that she the said A. B. on the, &c. at — in the county of — in the parish church of — to wit, at, &c. aforesaid, was accoupled to the said E. B. deceased, in lawful matrimony, and this she is ready to verify, when, where, and in such manner as the court here shall consider, &c.

[\*1818] \*And the said A. B. by the said — her attorney aforesaid, says, that she ought not, by any thing in the plea of the said C. D. above alleged, to be barred from having her aforesaid dower in this behalf, because she says, that she the said A. B. on, &c. was accoupled to the said E. B. deceased, in lawful matrimony, at Edinburgh, in that part of Great Britain called Scotland, and this she prays, may be inquired of by the country.

Plea, that  
wife eloped  
from her  
husband  
and lived  
in adultery  
with her  
present  
husband  
(w).

And the said C. D. by — his attorney, comes and says, that the said A. B. and E. his wife, ought not to have the dower of the said E. of the said one undivided moiety of the said tenements and premises in the said declaration mentioned, with the appurtenances, by the endowment of the said F. formerly her husband, because he the said C. D. says, that the said E. heretofore, and in the life-time of the said F. and during her coverture with and whilst she was the wife of the said F., to wit, on, &c. at, &c. of her own accord, and without the license or consent, and against the will of the said F., eloped from and left him the said F. her said husband, and thereupon then and there, and continually afterwards, lived in adultery with the said A. B. during the whole life of the said F. to wit, at, &c. aforesaid: and the said C. D. further in fact says, that the said F. in his life-time was not at any time after the said E. so as aforesaid eloped from the said F., or whilst or after the said E. eloped, lived from the said G. in adultery with the said A. B. voluntarily or in any manner reconciled to the said E. (x) and this he the said C. D. is ready to verify; wherefore he prays judgment if the said A. B. and E. ought to have the dower of the said E. of the said one undivided moiety of the said tenements and premises in the said declaration mentioned, with the appurtenances, by the endowment of the said F. formerly her husband, &c.

[\*1819]

(t) See 10 Wentw. Prec. 158.—2 Rast. Ent. 228.—Co. Ent. 180.—2 Saund. 44, 5, in notes. The record proceeds in the following manner; “and because the cognizance of causes of this kind belongeth to the Ecclesiastical Court, therefore it is commanded to — bishop of — the diocesan of the said place, that he, conveying before him those who ought to be couvened in this behalf, do diligently inquire into the truth of the fact, and what he shall find thereon, he shall make appear here to our justices at Westminster, by his letters patent and writ close.” Then follows the writ to the bishop, reciting the pleadings and issue, and the parish church where the espousals are alleged to have taken place, 2 Hen. Bla. 149.

(u) See 10 Wentw. 158.—Rast. Ent. 228.—Co. Ent. 180. This replication was demurred

to on three grounds, first, because a marriage in Scotland did not entitle the demandant to dower; second, because no place in England was alleged for a venue; and thirdly, because it concluded to the country, but the replication was held sufficient; the first point was given up, and the two others were decided against the defendant, it was held, that a marriage in a foreign country was properly triable by a jury. 2 Hen. Bla. 145.—Ilderton v. Ilderton, and 2 Saund. 44, 45, in notes.—East, 478.

(w) See Rast. Ent. 230, s. 9.—Rob. Ent. 260.—1 Bro. Ent. 204.—2 Saund. 44, 5, in notes, and see the form in 6 Bing. 135.

(x) This allegation seems unnecessary, as a reconciliation must be replied, if relied on, 2 Saund. 45, n. 1.

And the said A. B. & E. his wife, as to the said plea of the said C. D. say, that they, by reason of any thing by the said C. D. in that plea above alleged, ought not to be barred from having the dower of the said E. of the said one undivided moiety of the said tenements and premises in the said declaration mentioned, with the appurtenances, by the endowment of the said F. formerly her husband, because they say that she the said E. in the lifetime of the said F. did not elope from the said F. her said husband, nor live from him the said F. in adultery with the said A. B. in manner and form as the said C. D. hath above in his said plea in that behalf alleged. And this they pray may be inquired of by the country, &c.

PROCEED-  
INGS  
IN DOWER.  
Replica-  
tion that  
she did not  
elope (y).

J. H. } (Ss.)—And the said J. H. by W. G. his attorney, comes, and as to one acre of land, with the appurtenances, in the parish of W. aforesaid, part of the said thirty acres of land, in the said demand of the said A. mentioned, and whereof, &c. and also as to one acre, and the half of another acre of meadow, with the appurtenances, in W. aforesaid, part of the said thirty acres of meadow in the said demand of the said A. mentioned, and whereof, &c. says, that he the J. H. on the day of suing forth the original writ of the said A. and before was, and from thence hitherto hath been, and still is, sole tenant of the said one acre of land, and one acre and a half of meadow, parcel, &c. without this that the said G. T. on the day of suing forth the original writ of the said A. or at any time since, had any thing in the said one acre of land, and one acre and a half of meadow, parcel, &c. with the appurtenances.

Pleas by  
defendant  
as to part  
sole tenan-  
cy; to the  
said part  
*ne unques  
seisie que  
dower*; to the  
resi-  
due, plea  
of non-ten-  
ure, and  
proceed-  
ings there-  
on (z).

And the said J. H. by leave, &c. further says, the said A. ought not to have her dower thereof, or any part thereof, of the endowment of the said J. C. heretofore her husband; because he says, that he the said J. C. heretofore the husband of the said A. neither on the day on which he espoused the said A, or at any time afterwards, was seised of the said one acre of land, and one acre and a half of meadow, with the appurtenances, or any part thereof, of such an estate whereby he could endow the said A. thereof; and this he is ready to verify, &c.

Second  
plea.

And as to the residue of the said lands and tenements mentioned in the said demand of the said A. and whereof, &c. he the said J. H. says, that the said J. H. cannot render to the said A. her dower thereof, or any part thereof; because he saith, that he the said J. H. is not, nor on the day of suing forth the original writ of the said A. or at any time since has been tenant thereof, or of any part thereof, as of freehold, either solely or jointly with the said G. T. and this he is ready to verify; wherefore as to the said residue of the said lands and tenements, he prays judgment of the said writ, &c.

[\*1820]

Third plea.

Upon these pleas, Mr. Warren gave the following opinion:—

“As here is in this case a separate tenancy, there ought to be separate

PROCEED-  
INGS IN  
DOWER.

actions, and defendants having severally pleaded non-tenancy, I think this action ought to be discontinued, and new ones brought against each respective tenant."

Issue, &c.  
in dower.

To save the trouble of beginning anew, Mr. H.'s attorney consented to alter his plea, and the attorneys being agreed, Mr. W. drew the following issue, &c.

First, the declaration.

Then the plea of defendant T.

And the said J. H. by W. G. his attorney, comes and says, that he is not, nor on the day of suing out the original writ of the said A. or at any time after, either jointly with the said G. T. or solely, tenant of the said premises, in the said demand of the said A. mentioned, or any part thereof, and this he is ready to verify; whereof he prays judgment of the said writ, and that the same, as to him the said J. H. be quashed, &c.

[\*1321] And the said A. says, that she cannot deny the matters contained in the said plea of the said J. H. but admits the "same to be true; therefore it is considered by the justices here, that the said writ, as to the said J. H. be quashed, &c. and the said A. as to the said plea of the said G. T. above lastly pleaded in bar, says, that she, by any thing therein alleged, ought not to be barred from recovering of her dower in this behalf against the said G. because she says, that she the said A. at A. in the county of B. at and in the parish church at A. aforesaid, in the life-time of the said J. to wit, on, &c. was coupled with the said J. in lawful matrimony; and this she is ready to verify, where, when, and in what manner this court here shall direct, &c. and because the cognizance of this matter wholly belongs to the Ecclesiastical Court: therefore C. D. by divine permission, bishop of E. F. diocesan of that place, is commanded that calling together before him such as in this behalf ought to be called, he diligently inquire the truth of the premises, and what he shall have found by such inquiry, he make appear to his majesty's justices here, in three weeks from the day of the Holy Trinity, by his letters patent and writ close; and as to the trial of the issue above joined between the said parties to be tried by the country, the sheriff is commanded that he cause to come here in three weeks from the day of the Holy Trinity, twelve, &c. by whom, &c. and who neither, &c. to recognize, &c. because as well, &c. the same day is given to the said parties here, &c.

Forms of  
issue, &c.  
in dower.

*See form of issue, award of venire jurata, respite of jury, and other proceedings, 2 Saund. 330, 331.—10 Wentw. 159, 160.—2 Saund. 45, in the notes.*

Postea,  
finding  
that the  
husband  
died seised,

Afterwards, that is to say, on the day and at the place within mentioned, before —, chief justice of our lord the king, of the Bench, and Sir —, one other of the justices of our said lord the king, of the Bench, justices of our said lord the king, assigned to take the assizes in the county of —,

according to the form of the Statute, &c. comes as well the within-mentioned F. D., widow, as the within named \*B. D. by her attorney, within-mentioned, and the jurors of the jury, whereof mention is within made, being summoned, some of them, that is to say, J. B., J. G. junior, J. G., E. O., R. H., J. F., W. W., and W. J. come and are sworn upon that jury; and because the residue of the jurors of the same jury do not appear, therefore others of the by-standers being chosen by the sheriff of the county aforesaid, at the request of the said F. D. and by the command of the said justices, are appointed anew, whose names are annexed to the within written panel, according to the form of the Statute in such case made and provided; which said jurors so appointed anew, that is to say, H. A., R. K., J. M., and G. W. being called likewise, come, who, together with the said other jurors before impaneled and sworn, being chosen, tried and sworn to speak the truth of the matters within contained, say, upon their oath, that the within-named E. D. heretofore the husband of the said E. D. was, on the day in which he married the said F. D. and after, seised of such estate of and in the within-named manors, tenements, and rents, with the appurtenances, and advowson within-mentioned, that he could endow the said F. D. thereof as the said F. D. has within alleged. And the jurors aforesaid, upon their oath aforesaid, further say, that the said F. D. being so as aforesaid seised of such estate, of and in the within mentioned manors, tenements, and rents, with the appurtenances and advowson aforesaid, died so seised thereof on the — day of —, in the — year of the reign, &c. and that the said manors, tenements, and rents aforesaid, with the appurtenances and advowson aforesaid, are worth by the year in all issues, besides reprises, £—, and they assess the damages of the said F. D. on occasion of the detention of her said dower, over and above the said value, and over and above her costs and charges by her about her suit in this behalf expended, to £—, and for those costs and charges to 40s. Therefore, &c.

PROCEEDINGS IN DOWER.

and stating the value of the estate, and finding damages and costs (a).  
Tales.

[To the end of the postea, as supra, and then proceed as follows:—] Therefore it is considered, that the said A. B. do recover against the said C. D. as well her seisin of a third part of the said manors, tenements, and rents, with the appurtenances, and of the advowson aforesaid, to hold to her in severalty by metes and bounds, to the value of a third part of the said manors, tenements, and rents, with the appurtenances and advowson aforesaid, from the time of the death of the said E. B. heretofore her husband, which said value, from the time of the death of the said E. B. heretofore her husband, amounts to £475, and her damages aforesaid to £14, by the jurors aforesaid, in form aforesaid assessed, and also £41 for her said costs and charges by the court here adjudged of increase to the said A. B. and with her assent, which said value and damages in the

Judgment after verdict to recover seisin of a third part of the premises, and for damages found by jury and costs (b).

[1823]

(a) See forms, 2 Saund. 331. See another form finding as to part, that the deceased husband was seised at the time of the marriage, but not that he died seised, and as to the residue of the tenements, that the husband was not seised at any time during the coverture, 10 Westw. 160. As to the recovery of damages

and costs in general, see 2 Saund. 45, in note. —2 Sel. Prac. 1st edit. 203, 4; 2d edit. 209, 10.

(b) See form, 2 Saund. 48, in notes, and 332. As to the judgment in dower in general, see Com. Dig. Pleader, 2 Y. 19.—2 Sel. Prac. 1st edit. 801; 2d edit. 207 to 212.

PROCEED-  
INGS  
DOWER.

whole amount to £580, and the said B. in mercy, &c. (c) whereof £48 10s. are assigned to T. R. esq. clerk of our lord the king.

Judgment  
after ver-  
dict for de-  
mandant  
for seisin,  
where no  
damages  
were found  
by jury  
(d).

Therefore it is considered, that the said S. do recover against the said J. her seisin of the said third part of the said three messuages, two work-houses, one garden, and two back sides, with the appurtenances, parcel of the tenements within specified, whereof, &c. to hold to her in severalty by metes and bounds, and the said J. in mercy, &c. and hereupon the said S. prays a writ of our lord the king to be directed to the sheriff of the county aforesaid, to cause her to have full seisin of the said third part of the said three messuages, two work-houses, one garden, and two back sides, with the appurtenances, parcel, &c. and it is granted to her, returnable here on, &c.

Writ of  
*habere fa-  
cias seisi-  
nam* of the  
recovered  
dower by  
verdict,  
without  
damages  
(e).

[\*1324]

William the Fourth, by the grace of God, of the United Kingdom of Great Britain and Ireland king, defender of the Faith. To the sheriff of Essex, greeting:—Whereas A. B. widow, who was the wife of E. B. deceased, hath lately in our court, before Sir J. E. knt. and his companions, our justices of the Bench at Westminster, by our writ of dower, whereof she hath nothing, and by the judgment of the said court recovered against C. D. her seisin of the third part of [three messuages, two work-houses, one garden, and two back sides,] with the appurtenances, in the parish of —, in your county, as the dower of her the said A. B. of the endowment of the said E. B. her late husband, whereof the said C. D. is convicted, as by the record and proceedings thereof remaining in our said court of the bench at Westminster aforesaid, more fully appears. Therefore we command you, that you, without delay, deliver to the said A. B. seisin of the said third part of the said three messuages, two work-houses, one garden, and two back sides, with the appurtenances, to hold to her in severalty by metes and bounds, according to the force, form, and effect of the said recovery, and how you shall execute this our writ, certify to our justices at Westminster, on —, returning to us this our writ. Witness, &c.

Entry of  
judgment  
by default,  
suggestion  
that hus-  
band died  
seised;  
award of  
writ of sei-  
sin and in-  
quiry of  
damages,  
and sher-  
iff's re-  
turn, and

And the said C. D. by —, his attorney, comes and says nothing in bar or preclusion of the said action of the said A. B. whereby the said A. B. remains undefended therein against the said C. D. Therefore it is considered, that the said A. B. recover against the said C. D. her seisin of the third part above demanded, with the appurtenances, to be held by her in severalty by metes and bounds, and the said C. D. in mercy, &c. And thereupon the said A. B. says, that E. B. her late husband, on, &c. died seised of the tenements aforesaid with the appurtenances, in his demesne as of fee, and prays a writ of our said lord the king, to be directed to the sheriff of the said county of B. as well to give her full seisin of the third part aforesaid, with the appurtenances, to be held by her in severalty

(c) See 2 Bro. C. C. 620.

(d) See form, 10 Wentw. 161. and Sel. Prac. 1st edit. 308; 2d edit. 209. Com. Dig. Pleader, 5 Y. 19.

(e) See form, 10 Wentw. 161.—Lil. Ent. 598. If damages and costs have been re-

covered, the writ may also direct the sheriff to levy them, as in writs of *habere facias possessionem* in ejectment, see Tidd's Forms, 4th edit. 260, 1, 2. See form of a writ of *capias ad satisfaciendum*, for damages in dower, Lil. Ent. 545.

by metes and bounds, as to inquire of the damages, and it is granted to her returnable here on, &c. At which day here comes the said A. B. by her attorney, and the said sheriff, to wit, J. W. esq. now returns that, he, by virtue of the said writ to him directed, on the — day of — last past, did cause the said A. B. to have full seisin of the third part of the tenements aforesaid, with the appurtenances, that is to say, of one messuage, &c. [*Here describe the premises delivered by the sheriff to the demandant, and in whose occupation they are according to the description of the recital*] to hold the same to the said A. B. in severalty by metes and bounds, for and in the name of the whole dowry of the said A. B. of the tenements aforesaid, with the appurtenances, happening to her by the death of the said E. B. her late husband, as by the said writ he was commanded, &c. The said sheriff also returns here a certain inquisition taken before him at the house of —, at —, in the said county, the — day of — last past, by the oath of twelve, &c. by virtue of the writ aforesaid taken, by which it is found that the said E. B. heretofore the husband of the said A. B. in the said writ named, on the — day of —, in the year of our Lord —, died seised of and in the said tenements, with the appurtenances, in the said writ specified, in his demesne as of fee, and that the said tenements, with the appurtenances, are of the clear yearly value in all issues beyond reprises of £300, and that three years are elapsed from the death of the said E. B. until the suing out of the said inquisition, and that the said A. B. has sustained damages by reason of the detaining of the said dower beyond the value aforesaid, and also over and above her costs and charges by her about her suit in this behalf expended, to £80, and for those costs and charges to 40s. Therefore it is considered, that the said A. B. recover against the said C. D. as well the value of the third part of the tenements aforesaid, with the appurtenances, from the time of the death of the said E. B. her late husband, until the suing out of the said inquisition, which said value amounts to £300, and her damages aforesaid to £82, by the inquisition aforesaid, in form aforesaid found, and also £100 10s. by the court here adjudged of increase to the said A. B. at her request, for her costs and charges aforesaid, which said value and damages in the whole amount to £482 10s., &c.

PROCEEDINGS IN DOWER.  
—  
final judgment thereon (f).

[\*1325]

Final judgment.

William the Fourth, &c. to the sheriff of Essex, greeting: Whereas A. B. widow, who was the wife of E. B. lately in our court before — and —, and his companions, our justice at Westminster, recovered for seisin against C. D. of the third part of [one messuage, one stable, 10 acres of land, 15 acres of meadow land, and 15 acres of pasture land,] with the appurtenances, in the parish of T. in your county as her dower, of the endowment of the said E. B. her late husband, by our writ of dower, whereof she hath nothing, as by the record and process thereof now remaining in our said court, appears to us of record; therefore we command you, that without delay you cause the said A. B. to have her full seisin of the said third part with the appurtenances, to hold to her in

Writ of seisin and inquiry of damages after judgment by default (g).

[\*1326]

(f) See form, 2 Saund. Rep. 45, note 4; 1 Rich. Prae. C. P. 4th edit. 435, 436, 437; 1 Morg. Prec. 586; and see a form of judgment where defendant confesses right to dower, 1 Rich. C. P. 4th edit. 437 to 439.

(g) See another form, 10 Wentw. 162; Thesaurus Brevium, 139.—Clift. Ent. 801, 802.—Booth, 168.—2 Sel. Prae. 1st edit. 803, &c.; 2d edit. 209, &c.; and 2 Saund. 45, note 4.

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INGS IN  
DOWER.

severalty by metes and bounds, and how you shall have executed this writ make known to our justices at Westminster, on —; we commanded you also, that by the oath of good and lawful men of your bailiwick, you diligently inquire of the said E. B. the late husband of the said A. B. died seised of the said tenements with the appurtenances in fee-simple or fee-tail, and if by that inquisition you shall have so found them by their oath, that you diligently inquire how long time has elapsed from the time of the death of the said E. B. and how much the said tenements with the appurtenances are worth by the year, in all issues beyond reprises, according to their true value, and what damages the said A. B. hath sustained as well by occasion of the detention of her said dower beyond the said value, as for her costs and charges by her about her suit in this behalf expended, and the inquisition which you shall have thereupon made, make known to our said justices at the said time under your seal, and the seal of those by whose oath you shall have made that inquisition and this writ. Witness, — lord —, at Westminster, this — day of —, in the — year of our reign.

[ \*1830 ]

### \*PROCEEDINGS IN INTRUSION.

Writ of intrusion by the heir of the remainder-man, upon an intrusion after death of tenant for life (A).

The king, to the sheriff of the county of Devon, greeting :—Command Thomasin Baker, that justly, &c. she render to J. E. [1 barn, 1 lintray, 2 orchards, 20 acres of arable land, 20 acres of meadow land, 20 acres of pasture land, and twenty acres of other land,] with the appurtenances called — in the parish of — in the country of Devon aforesaid, which he claims to be his right and inheritance, and into which the said Thomasin Baker hath not entry, but after the intrusion which John Baker made into it, after the death of Mary his wife, formerly called Mary Boatfill, to whom Jane Boatfill being seised thereof in her demesne as of fee, devised the same for the life of her the said Mary, and from and after the death of the said Mary, to Mr. E. since deceased, and his heirs forever, and the heir of which said Mr. E. the said J. E. is, and which, after the death of the aforesaid Mary Boatfill, ought to revert to the aforesaid J. E. he saith, and whereof he complains, &c. and unless, &c.

Declaration thereon by heir of remainder-man, for an intrusion after death of tenant for life (i).

*In Common pleas.*

— Term, 1 Will. 4.

*Devonshire* (to wit.) J. E. by J. H. his attorney, demands against Thomasin Baker, [1 barn, 1 lintray, 2 orchards, 20 acres of arable land, 20 acres of meadow land, 20 acres of pasture land, and 20 acres of other land,] with the appurtenances, called — in the parish of — in

(A) These were the proceedings in the case of *Eastman v. Baker*, 1 Taunt. 174. Judgment was given for the demandant, see Booth on Real Actions, 181, 190, 1, 2, book iii. ch. iv. & ix.—F. N. B. 268.—Rest. Ent. 515.—Reg. Brev. 285. As to the summons, &c. see

the directions relative to Proceedings in dower ante, 1812, 18.—See 1 Jac. & Walk. 552; see Id. 557.—1 Marsh. 509.—6 Taunt. 263.

(i) See the note to the writ, supra.—Booth on Real Actions, 192.—1 Taunt. 174.



county of — which he claims to be his right and inheritance, by writ of our lord the king of intrusion, and thereupon he says, that Jane Boatfill, now deceased, was in her life-time, and at the time of her making of her last will and testament, and of her decease as herein mentioned, seised of the said \*tenements, with the appurtenances, in her demesne as of fee and right, in the time of peace, in the time of the lord George the second, late king of Great Britain, within 50 years now last past (*k*), by taking the esplees thereof, to the value, &c. and being so seised thereof, the said Jane Boatfill, heretofore, to wit, on the — day of — in the year of our Lord — in the parish aforesaid, in the county aforesaid, duly made and published her last will and testament in writing, bearing date the day and year last aforesaid, and signed by her the said Jane Boatfill, according to the form of the Statute in such case made and provided, and thereby gave and devised the said tenements, with the appurtenances, to Mary Baker, formerly called Mary Boatfill, for the term of her natural life, and from and after the decease of the said Mary Baker, she the said Jane Boatfill, by her said last will and testament, gave and devised the said tenements, with the appurtenances, to W. E. and his heirs forever : And the said J. E. further saith, that afterwards, to wit, on the — day of — in the year last aforesaid, in, &c. aforesaid, the said Jane Boatfill died so seised, of and in the said tenements, with the appurtenances, without revoking or altering her said will, with respect to the said devises ; whereupon and whereby, and under and by virtue of the said last will and testament of the said Jane Boatfill, the said Mary Baker then and there became and was seised of and in the said tenements, with the appurtenances, for the term of her natural life, and the said W. E. also thereby then and there became and was seised of the reversion, of and in the said tenements, with the appurtenances, in his demesne (*l*) as of fee, expectant on the decease of the said Mary Baker : And the said John further saith, that afterwards, and during the life of the said Mary Baker, to wit, on the — day of — in the year of our Lord — the said W. E. died intestate, and so seised in his demesne (*l*) as of fee, of and in the said reversion of and in the said tenements, with the appurtenances, expectant on the death of the said Mary Baker as aforesaid, to wit, at, &c. aforesaid, and thereupon the said reversion, so expectant as aforesaid, then and there descended and came to the said John, and he the said John then and there became seised in his \*demesne as of fee, of and in the same, as the said John's eldest brother, and heir at law of the said W. E. deceased : And the said John further saith, that afterwards, *and within 30 years next before the commencement of this suit*, to wit, on the — day of — in the year of our Lord — at, &c. aforesaid, she the said Mary Baker died so seised of her said estate for life, of and in the said tenements, with the appurtenances, and thereupon the same tenements, with the appurtenances, then and there came to and reverted, to the said John, as eldest brother, and heir of the said W. E. devisee in fee of the said tenements, with the appurtenances, as aforesaid, *and into which the said Thomasin Baker hath not entry : but after the intrusion which John Baker made into the said tenements, with the appurtenances, after the de-*

PROCEEDINGS IN INTRUSION.

[\*1881]

[\*1882]

(*k*) You must count on the actual seisin of the ancestor, and not of the tenant for life, 1 Jac. & Walk. 557. (*l*) Should not the words "in his demesne," be omitted?

**PROCEEDINGS IN INTRUSION.** *cease of the said Mary Baker, formerly called Mary Boatfill, (w) and therefore the said John brings his suit, &c.*

Pleas; first denial of Jane Boatfill's seisin.

Baker

ats.

Eastman.

Second, that lands did not descend in the manner alleged.

Third plea, that on the death of Jane Boatfill, one John Baker and his wife became seised in fee.

Fourth, that, on the death of Jane Boatfill, Mary Baker, under John Baker's will, became seised of the premises, and

} And the said Thomasin, by Thomas Smith, her attorney, comes and defends her right when, &c. and says, that the said Jane Boatfill did not die seised of and in the said tenements, with the appurtenances, in her demesne, as of fee and right, in manner and form as the said John Eastman hath above in his said count alleged, and of this she puts herself upon the country. And for a further plea in this behalf, she the said Thomasin, by leave of the court here to her granted, according to the form of the Statute in such case made and provided, says, that the said John Eastman ought not, by reason of any thing above alleged, to have and maintain his aforesaid action against her, because she says, that upon the death of the said Jane Boatfill, one John Baker, the husband of the said Mary Baker, and the said Mary Baker, in right of the said Mary Baker, became and were seised of and in the said tenements, with the appurtenances, in their demesne as of fee, to them and the heirs of the said Mary Baker, to wit, at, &c. aforesaid, without this, that upon the death of the said Jane Boatfill, the said Mary Baker, under and by virtue of the said last will and testament of the said Mary Boatfill, became and was seised of and in the said tenements, with the appurtenances, for the term of her natural life; and the said William Eastman also thereby

[ \*1833 ] then and there became and \*was seised of the reversion of and in the same tenements, with the appurtenances, in his demesne as of fee, expectant on the decease of the said Mary Baker, in manner and form as the said John Eastman hath above alleged, and this she is ready to verify; wherefore she prays judgment if the said John Eastman ought to have and maintain his aforesaid action against her. And for a further plea in this behalf, she the said Thomasin, by leave of the court here for this purpose granted, according to the form of the statute in such case made and provided, says, that the said John Eastman, by reason of any thing above alleged, ought not to have or maintain his aforesaid action thereof against her, because she says, that upon the death of the said Jane Boatfill, one John Baker, the husband of the said Mary Baker, and the said Mary Baker, his wife, in right of the said Mary Baker, became and were seised of and in the said tenements, with the appurtenances, in their demesne as of fee, to them and the heirs of the said Mary Baker, to wit, at the parish aforesaid, in the county aforesaid, and this she is ready to verify; wherefore she prays judgment if the said John Eastman ought to have and maintain his aforesaid action thereof against her. And for a further plea in this behalf, she the said Thomasin, by leave of the court here to her for this purpose granted, according to the form of the Statute in such case made and provided, says that the said John Eastman ought not, by reason of any thing by him above alleged, to have and maintain his aforesaid action thereof against her, because she says that before the said Jane Boatfill had any thing in the same tenements, that is to say, on the — day of — in the year of our Lord — at, &c. aforesaid, John Boatfill, the father of the said Jane Boatfill, was seised of the same tenements, with

the appurtenances, in his demesne as of fee and right, by taking the esplees thereof to the value, &c. ; and being so seised, he the said John Boatfill, heretofore, to wit, on, &c. last aforesaid, duly made and published his last will in writing, bearing date the same day and year aforesaid, duly executed and attested to pass real estates, and thereby devised as follows, to wit, "I also give, &c." [*The will was set out as in 1 Tuunt. 174, 5.*] And the said Thomasin further says that the said John Boatfill afterwards, to wit, on the — day of — in the year last aforesaid, in, &c. aforesaid, died so seised of and in the same tenements, with the appurtenances, without revoking or altering his said will ; \*whereupon and under and by virtue of the said last-mentioned will, the said John Boatfill then and there became and was seised of the same tenements, with the appurtenances, according to the same will ; and being so seised thereof, she the said Jane Boatfill afterwards, to wit, on the — day of — in the year of our Lord — at, &c. aforesaid, died, without ever having been married, and without issue, in the life time of her said mother, then Mary Baker ; whereupon, and under and by virtue of the said will of the said John Boatfill, John Baker, and the said Mary Baker, his wife, in right of the said Mary Baker, became and were seised of the same tenements, with the appurtenances, in their demesne as of fee, to wit, to them and the heirs of the said Mary ; and the said John Baker and Mary his wife, so being seised thereof in right of the said Mary as aforesaid, she the said Mary afterwards, to wit, on the — day of — in the year of our Lord — at, &c. aforesaid, died so seised thereof as aforesaid, without having had any issue by her said husband John Baker, whereupon the said tenements, with the appurtenances, descended and came to Elizabeth Hill, the only sister and heir of the said Mary, who thereupon then and there became and was seised thereof in her demesne as of fee ; and being so seised, she the said Elizabeth, afterwards, to wit, on the — day of — in the year of our Lord — at, &c. aforesaid, enfeoffed the said John Baker of the same tenements, with the appurtenances, to have and to hold the same, with the appurtenances, to him the said John Baker and his heirs ; whereupon the said John Baker became and was seised thereof in his demesne as of fee ; and being so seised thereof, he the said John Baker, afterwards, to wit, on, &c. at, &c. aforesaid, died so seised ; whereupon the said tenements, with the appurtenances, descended and came to John Baker the younger, the only son and heir of the said John Baker, who thereupon became and was seised thereof in his demesne as of fee ; and being so seised thereof, he the said John Baker the younger, afterwards, to wit, on, &c. at, &c. aforesaid, duly made and published his last will and testament in writing, bearing date the same day and year last aforesaid, duly executed and attested to pass real estates, and thereby, amongst other things, gave and devised the same tenements, with the appurtenances, to the said Thomasin, for and during the term of her natural life, with divers remainders over ; and the said John Baker the younger, afterwards, to wit, \*on, &c. at, &c. aforesaid, in the county aforesaid, died so seised of and in the same tenements, with the appurtenances, without revoking or altering his said will, whereby, and by virtue thereof, the said Thomasin became and was and yet is seised of and in the same tenements, with the appurtenances, for the term of her natural life, to wit, at, &c. aforesaid, without this, that upon the death of the said

PROCEEDINGS IN INTRUSION.  
William Eastman of the reversion expectant on the death of Mary Boatfill, setting out the will, &c.

[\*1834]

[\*1886]

PROCEED-  
INGS IN  
INTRUSION.

Fifth plea  
nearly  
similar.

Jane Boatfill, the said Mary Baker under and by virtue of the said last will and testament of the said Jane Boatfill, became and was seised of and in the said tenements, with the appurtenances; and the said William Eastman also thereby then and there became and was seised of the reversion of and in the said tenements, with the appurtenances, in his demesne as of fee, expectant on the decease of the said Mary Baker, in manner and form as the said John Eastman hath above alleged; and this the said Thomasin is ready to verify; wherefore she prays judgment if the said John Eastman ought to have or maintain his aforesaid action against her. And for a further plea in this behalf, she the said Thomasin, by like leave of the court here, for this purpose granted, according to the form of the Statute in such case made and provided, further says, that the said John Eastman ought not, by reason of any thing by him above alleged, to have and maintain his aforesaid action against her, because she says, that before the said Jane Boatfill had any thing in the same tenements, that is to say, on the said — day of — in the said year of our Lord — at, &c. aforesaid, John Boatfill, the father of the said Jane Boatfill, was seised of the same tenements, with the appurtenances, in his demesne as of fee and writ, by taking the esplees thereof, to the value, &c.; and being so seised thereof, he the said John Boatfill, heretofore, to wit, on, &c. last aforesaid, duly made and published his last will and testament in writing, bearing date the same day and year last aforesaid, duly executed and attested to pass real estates, and thereby, amongst other things, devised as follows, to wit, "I also give," &c. [*Here the will was set forth.*] And the said Thomasin further says, that the said John Boatfill afterwards, to wit, on the said — day of — in the year last aforesaid, at, &c. aforesaid, died so seised of and in the same premises, with the appurtenances, without altering or revoking his said will; whereupon, and under and by virtue of the said will, the said Jane Boatfill then and there became and was seised of the same tenements, \*with the appurtenances, according to the same will; and being so seised thereof, she the said Jane Boatfill afterwards, to wit, on, &c. at, &c. aforesaid, died without ever having been married, and without issue, in the life-time of her said mother the said Mary Baker; whereupon, and under and by virtue of the said will of the said John Boatfill, one John Baker, and the said Mary Baker his wife, in the right of the said Mary Baker, became and were seised of the same tenements, with the appurtenances, in their demesne as of fee, that is to say, to them and the heirs of the said Mary; and the said John Baker and Mary his wife, so being seised thereof, in right of the said Mary as aforesaid, she the said Mary afterwards, to wit, on, &c. at, &c. aforesaid, died so seised thereof as aforesaid, without having had any issue by her said husband John Baker, whereupon the said tenements, with the appurtenances, descended and came to Elizabeth Hill, as the only sister and heir of the said Mary, who thereupon became and was seised thereof in his demesne as of fee; and being so seised thereof, she the said Elizabeth afterwards, to wit, on, &c. at, &c. aforesaid, enfeoffed the said John Baker of the same tenements, with the appurtenances, to have and to hold the same, with the appurtenances, to him the said John Baker and his heirs, whereupon the said John Baker became and was seised thereof in his demesne as of fee; and being so seised thereof, he the said John

[\*1886]

afterwards, to wit, on, &c. at the parish aforesaid, in the county aforesaid, died, whereupon the same tenements, with the appurtenances, descended and came to John Baker the younger, the only son and heir of the said John Baker, who thereupon then and there became and was seised thereof in his demesne as of fee; and being so seised thereof, he the said John Baker the younger, afterwards, to wit, on, &c. at, &c. aforesaid, duly made and published his last will in writing, bearing date the same day and year aforesaid, duly executed and attested to pass real estates, and thereby, amongst other things, gave and devised the same tenements, with the appurtenances, to the said Thomasin, for and during the term of her natural life, with divers remainders over; and the said John Baker the younger, afterwards, to wit, on, &c. at the parish aforesaid, in the county aforesaid, died so seised of and in the same tenements, with the appurtenances, without revoking his said will and testament, whereby, and by virtue thereof, the said Thomasin became, and was, and yet is seised of and in the same tenements with the appurtenances, for the term of her natural life, to wit, at, &c. aforesaid, and this the said Thomasin is ready to verify; wherefore she prays judgment if the said John Eastman ought to have or maintain his aforesaid action thereof against her.

PROCEEDINGS IN INTRUSION.

Eastman

v. } And the said John, as to the said plea of the said Thomasin Baker. } by her first plea above pleaded, and "whereof she hath put herself upon the country, doth the like. And the said John, as to the said plea of the said Thomasin, by her secondly above pleaded, says, that he the said John, by reason of any thing in that plea above alleged, ought not to be barred from having and maintaining his aforesaid action thereof against the said Thomasin, because, as before, he says, that upon the death of the said Jane Boatfill, the said Mary Baker, under and by virtue of the said last will and testament of the said Jane Boatfill, did become and was seised of and in the said tenements, with the appurtenances, for the term of her natural life, and the said William Eastman also thereby then and there became and was seised of the reversion of and in the same tenements, with the appurtenances, in his demesne as of fee, expectant on the decease of the said Mary Baker, in manner and form as the said John Eastman hath above in his said count in that behalf alleged, and this he prays may be inquired of by the country, &c. And the said John, as to the said plea of the said Thomasin, by her thirdly above pleaded, says, that he the said John, by reason of any thing in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against her, because he says, that upon the death of the said Jane Boatfill, the said John Baker, the husband of the said Mary Baker, and the said Mary Baker did not become, nor were seised of and in the said tenements, with the appurtenances, in their demesne as of fee, to them and the heirs of the said Mary, in manner and form as the said Thomasin hath above, in her said first and fourth plea in that behalf alleged, and this he the said John also prays may be inquired of by the country. And the said John, as to the said plea of the said Thomasin, by him fourthly above pleaded, says, that the said John, by reason of any thing by the said Thomasin in that plea alleged, ought not to be barred from having and maintaining his aforesaid action

Replication to first plea, *similiter*.

[\*1837]

Second replication to second plea, re-asserting demandant's title.

Third replication to third plea, re-asserting demandant's title.

Fourth replication to fourth plea re-asserting de-

PROCEED-  
INGS IN  
INTRUSION.

mandant's  
title.

Fifth rep-  
lication to  
fifth plea,  
re-assert-  
ing de-  
mandant's  
title.

\*thereof against her, because he says, that the said Jane Boatfill, after she so became seised as aforesaid, to wit, on, &c. aforesaid, attained the full age of twenty-one years. And that afterwards, to wit, on the said, &c. in the parish aforesaid, in the county aforesaid, she duly made and published her said last will and testament, in manner and form as he the said John Eastman hath in his said count in that behalf alleged, and this he the said John Eastman is ready to verify; wherefore he prays judgment, if by reason of any thing by the said Thomasin, in her aforesaid plea alleged, he the said John Eastman ought to be barred from having and maintaining his aforesaid action thereof against the said Thomasin. And the said John Eastman, as to the said plea of the said Thomasin, by her lastly above pleaded, says, that he, by reason of any thing in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against her, because he says, that the said Jane Boatfill, after she so became seised as aforesaid, to wit, on, &c. at the parish aforesaid, in the county aforesaid, attained the full age of twenty-one years, and that afterwards, to wit, on, the said, &c. in the parish aforesaid, in the county aforesaid, she duly made and published her said last will and testament in writing, in manner and form as he the said John Eastman hath in his said count in that behalf alleged, and this he the said John Eastman is ready to verify; wherefore he prays judgment if he ought to be barred from having and maintaining his aforesaid action thereof against the said Thomasin.

[\*1839]

\*PROCEEDINGS ON WRITS OF ENTRY.

Writ of  
entry in  
the post  
(a).

William the Fourth, &c. to the sheriff of Northumberland, greeting: Command R. C. that justly and without delay he render to M. B. widow, [two messuages, &c.] in the parish of, &c. which she claims to be her right and inheritance, and into which the said R. C. hath not entry but after the disseisin, which he unjustly, and without judgment, made thereof to J. F. the brother of her the said M. and whose heir she is, within fifty years now last past as she saith; and unless he shall do so, and if the said M. shall give you security to prosecute her suit, then summon by good summoners the said R. C. that he appear before our justices at Westminster, on — to show why he will not do it, and have you there the summoners and this writ.—Witness, &c.

Declara-  
tion there-  
on.

*Northumberland* (to wit.)—M. B. widow, by — her attorney, demands against R. C. [two messuages, &c.] with the appurtenances, in &c. as her right and inheritance, and into which the said R. C. hath not entry but by the disseisin, which he unjustly, and without judgment, made thereof to J. F. the brother of the said M. B. and whose heir she is,

(a) See Booth on Real Actions, Index, proceedings, ante, 1811, note.—See form, "Entry," 178. Com. Dig. Pleading, 3 A. 1.—Bla. Com. App. No. 5.—F. N. B. 207, 8.—Lee's Dictionary, "Entry."—See form and law, at the suit of assignees of a bankrupt, 2 Lee's Dictionary, "Entry, Writ of."—Booth on Real Actions, 172, 3.—3 Bla. Com. 182.

within fifty years now last past; and thereupon the said M. B. by — her attorney aforesaid, saith, that the said J. F. was seised of the tenements aforesaid, saith, that the appurtenances, in the demense as of fee and wright, within fifty years before the issuing of the original writ in this cause, by taking the esplees (b) thereof to the value of, &c. and from the said J. F. who died without heirs of his body, the right descended to the said M. B. as sister and heir of the the said J. F. and into which the said R. C. had not entry but by the disseisin, which he unjustly, and without judgment made thereof to J. F. the brother of her the said M. B. and whose heir she is, within fifty years now last past.

PROCEEDINGS ON WRITS OF ENTRY.

\*And the said M. B. the demandant, now demands the said tenements, with the appurtenances, as sister and heir of the said J. F. as aforesaid, and that such is the right of her the said M. B. the demandant, she offers, &c. and therefore, &c. pledges, &c. [\*1840]

William the Fourth, &c. to the sheriff of Somersetshire, greeting:— Command J. D. that justly and without delay he render to A. B. [20 acres of arable land, 20 acres of pasture land, 20 acres of meadow land, and 20 acres of other land, with the appurtenances, in the parish of — in your county, which he claims to be his right and inheritance, and into which the said J. D. hath not entry, unless after the disseisin which — thereof unjustly and without judgment hath made to the aforesaid A. B. within thirty years now last past, and whereupon he complains that the said J. D. deforceth him, and unless he shall do so, and if the said A. B. shall give you security of prosecuting his claim, then summon by good summoners the said J. D. that he appear before our justices at Westminster, on — to show wherefore he hath not done it, and have you there the summoners and this writ. Witness ourself at Westminster, the — day of — in the — year of our reign.

Writ of entry in the post, in another form, where another person unlawfully entered (c).

The mode of proceeding on a plaint, in the nature of a writ of entry in the post, appears to be as follows: The steward of the manor having summoned the copyhold tenants to appear at the next general customary court, which must be held within the manor, should, when the homage are assembled, enter in his minute-book, and afterwards on the roll, the style of the court; if the court is held merely for copyhold purposes, the style should run thus:—

Proceedings in manor court, on plaint, in nature of writ of entry in the post.

Manor of } A general [or "special,"] customary court of — lord of — the manor of — aforesaid, held in and for the said manor, &c. before — esq. chief steward of the manor aforesaid.  
(See *Watkin's Treatise on Copyhold*, vol. ii. 81.)

If a court baron be held with the customary court, the style should then be as follows:—

Manor of } \*A court baron and general [or "special," if the fact] [\*1841] — customary court of — lord of the manor of — aforesaid, held in and for the said manor, on, &c.

(b) If there be a tenant in possession, the right owner, 8 B. & C. 802.

though he pay rent to a wrongful claimant, (c) See forms referred to, ante, 1889, n. (a).  
that is a sufficient taking of the esplees by

PROCEED-  
INGS ON  
WRITS OF  
ENTRY.

## PRESENT.

A. B. esq. chief steward of the said manor.  
C. D. } Free suitors sworn.  
E. F. &c. }  
G. H., &c. Copyhold tenants sworn.  
J. R. Beadle, &c. (*see 2 Watkins, 32.*)

When the style of the court has been properly entered, and proclamation made by oyer, in the usual way, the steward is then to say, "If any persons will enter any complaints, let them come forth and they shall be heard," (*Scroggs on Courts, 42, 196.*) The demandant is then to deliver the draft of the plaint, and prayer of process to the steward, who is thereupon to make an entry thereof, *verbatim*, in his minute-book, and afterwards enter the same on the court rolls. If the demandant is anxious to expedite the suit, he should at the same time (unless it has been previously *agreed* to be done,) require the steward to hold a customary court as soon as possible, and if he refuse, a *written* request, similar in substance to that in *Watkin's Treatise on Copyholds*, (vol. 2. p. 20,) should be made. If in the manor there are only two *general* courts held in each year, still *special* or *set* courts may be held at the request of any suitor, the *expense* whereof is to be paid by the person requiring it. The next court having previously been appointed (which should not be held within three weeks of the preceding one), the steward is then to issue a summons, returnable at such court.

[\*1842] At the next court, being the return day of the summons, the copyhold tenants having previously been duly warned to attend, the steward will then enter the style of the court, and cause proclamation to be made ~~at~~ before and make an entry of the summons and the return thereto (*see Rast. Ent. 130.*) He will then say, "If any person will be essoigned, or enter his plaint, let him come into court, and he shall be heard," and then, "A. B. appear, or you will loose your plaint," (*Scroggs, 196.*) If the demandant appears by his attorney, the steward is then to enter the warrant of attorney by his name, or the two first letters thereof, over the name of the demandant, (*Scroggs, 196, 252.*) The defendant is then to be called three times, as follows:—"Appear and answer to A. B. in a plea of land, &c. [*stating the substance of the plaint,*] or further process will be awarded against you," (*Scroggs, 196.*) If the defendant does *not* appear, an attachment, &c. should be prepared at such second court. If the defendant appears, the steward will then enter the appearance after the entry of the plaint and prayer of process as follows: "C. D. appears." (*Scroggs, 197.*) The demandant has till the next court after the appearance to count on his plaint, but in order to expedite the suit, it will be advisable to be prepared to count immediately the defendant appears which he will, in all probability, do at the return of the summons.

Plaint in  
nature of  
writ of en-  
try, in the  
per and cur  
(d).

[*After entering the style of the court, make the following entry:—*At this court comes T. O. B. in his own proper person, and complains of

(d) See Kitchen on Courts, 502.—1 M. & P. 102.



T. B. of a plea of land, to wit, of [12 messuages, 12 cottages, 12 yards, 12 gardens, 12 out-houses, and 12 acres of land,] with the appurtenances, in this manor, held of the lord this manor, as of his said manor of Stebonheath, otherwise Stepney, according to the custom of the said manor, and there are pledges for the prosecution of the said plaint, to wit, John Doe and Richard Roe, and he makes protestation to prosecute his said plaint in the nature of a writ of our lord the king of entry *sur disseisin* in the post (e) at the common law, saying that the said messuages, cottages, yards, gardens, out-houses, and land, are his right and inheritance, according to the custom of the said manor, and into which the said T. B. hath not entry, unless after the disseisin which E. B. thereof unjustly, and without judgment, made to C. S. the mother of the said T. C. B. and whose heir he is, within fifty years now last past, &c. and he prays that process be thereupon made to him against the said T. C. B. according to the custom of the said manor; therefore, according to the custom of the said manor, it is commanded to J. D. the bailiff, or of the lord of this manor, and an officer of this court, that according to the custom of this manor, he summon the said T. B. by good summoners, that he be here at the next court of this manor to be holden in and for the said manor, on the — day of — next, to answer the said T. C. B. in the plea aforesaid, the same day is given to the said T. C. B. here, &c. [ \*1843 ]

PROCEED-  
INGS IN  
WRITS OF  
ENTRY.

Stebonheath manor, ) To wit, W. L. steward of the said manor, to J. Mandate or  
otherwise ) D. the bailiff and minister thereof, greeting:—Be summons  
Stepney manor. ) cause T. C. B. complains of T. B. of a plea of land, thereon.  
to wit, of [12 messuages, 12 cottages, 12 yards, 12 gardens, 12 out-houses and 12 acres of land,] with the appurtenances, in this manor, held of the lord of this manor, as of his said manor of Stebonheath, otherwise Stepney, according to the custom of this manor, and hath made protestation to prosecute his said plaint in the nature of a writ of our lord the king of entry *sur disseisin* in the post, at the common law, saying that the said messuages, cottages, yards, gardens, out-houses, and land, are his right and inheritance, according to the custom of the said manor, and into which the said T. B. hath not entry, unless after the disseisin which E. B. thereof unjustly, and without judgment, made to C. S. the mother of the said T. C. B. and whose heir he is, within fifty years now last past; therefore I command you, that according to the custom of the said manor, you summon the said T. B. by good summoners, that he be here at the next court of this manor, to be holden in and for the said manor, on the — day of — next, to answer the said T. C. B. in the plea aforesaid, and have then and there the summons and this writ. Given under my hand and seal, the — day of — in the — year of the reign of King William the Fourth.

On the above writ the defendant must be summoned upon the land demanded, and proclamation of the summons should be made on some Sunday, 14 days at least before the return of the summons, at the door of the church nearest the land. For this purpose, the bailiff to whom the sum-

Directions  
as to the  
proceed-  
ings.

(e) See Kitchen on Courts, 508.

PROCEED-  
INGS ON  
WRITS OF  
ENTRY.

mons is directed, should, as soon as he can after the holding of the court, and at least 15 days before the return of the summons, go in the day-time, upon the most conspicuous part of the estate in question, with at least two persons resident within the manor, and they should cite or warn the defendant to appear at the return of the summons, by sticking up a white [\*1844] wand or stick on the land demanded, the summons should be read aloud, and it would be advisable to leave a copy thereof on the wand or stick; the respective occupiers of the premises should also be desired to attend, whilst this is done, and if they refuse, should be informed of the nature and object of the process, and at whose suit it is issued; it would also be advisable to warn or summon the defendant personally to appear, and to deliver to him a copy of the writ of summons. (See *Booth on Real Actions*, p. 4.—*Dalton's office of Sheriff*, 149, and 3 *Bla. Com.* 279.)

The directions of the Statute 31 Eliz. c. 6. s. 2. must next be observed; by this it is enacted, that after every summons upon the land, in any real action, 14 days at the least before the day of the return thereof, proclamations of the summons shall be made on a Sunday, immediately after divine service and sermon, if any sermon there be, and if no sermon there be, then forthwith after divine service, at or near to the most usual door of the church or chapel of that town or parish where the land whereupon the summons is made doth lie, and those proclamations so made as aforesaid, shall be returned, together with the names of the summoners. The proclamations should be made by the bailiff of the manor to whom the writ of summons is directed.

The summons must be executed in the day-time, between sun-rising and sun-set, and not before or afterwards, and there must be two summoners; as there is great contrariety in the directions for the execution of precept of summons in the old books, the safest way is to execute it in two methods; first, let the two summoners (who should be of the homage) fasten a copy of the precept, subscribed with the summoners' names, to a stick, and fix the stick, with the copy of summons so annexed, on some conspicuous part of the land in question; secondly, the summoners should serve the tenant with another copy of the summons of precept showing him the original in the usual manner of executing process, and they should at the same time verbally warn him to keep his day of the return, and to name the day, to name the demandant, and to name the land demanded; this indeed will be effectually done by reading the precept to him when executed; the bailiff should endorse on the precept the return as below, and deliver in the same to the steward on or before the next court day.

Other pro-  
ceedings in  
manor  
court, on  
plaint in  
nature of  
writ of en-  
try.  
Return of  
precept.

Let the demandant attend the court baron in person, and get the *plaint* and award of process entered on the roll.

By virtue of this precept to me directed, I have summoned by good summoners, to wit, — and — good and lawful men of the manor of C. the within named E. G. that she be at the place and time within manor

tioned, to answer the within named \*G. G. the younger, of the plea within mentioned, as by the said precept I am within commanded.

The answer of A. B. bailiff.

Summoners of the within named E. G. { A. B.  
and  
C. D.

Manor of C. in the } The general court baron of Sir G. W. P. bart.,  
county of H. } lord of the said manor, here holden in and for the  
same manor, before J. J. gentlemen, his steward there, of the same ma-  
nor, on — the — day of —, &c.

PROCEED-  
INGS ON  
WRITS OF  
ENTRY.

Entry of  
return of  
summons,  
admission  
of *prochein  
amie* for  
demand-  
ant, and  
appear-  
ance of  
tenant,  
with in-  
structions.

Homage sworn { A. B.  
C. D.  
E. F., &c.

It was commanded A. B. bailiff of the manor aforesaid, and officer of the said court baron, that according to the custom of the manor aforesaid, he should summon by good summoners, E. G. to be here at this court, to answer G. G. the younger, in a plea of land by his plaint, protesting to prosecute the same in the nature and form of a writ of our lord the king, of entry *sur disseisin en le'per & cui*, according to the custom of the said manor. And now here at this court comes the said G. G. the younger, in his proper person; and the said bailiff now here witnesseth, that he hath summoned by good summoners, to wit S. H. and W. C. good and lawful men of the manor of C. the said E. G. to be here at this court, to answer the said G. G. the younger, in the plea aforesaid, as it was commanded him by the court here, &c.

\*And hereupon the said G. G. the younger, sheweth to the court here, [\*1346] that he the said G. G. the younger, is an infant under the age of twenty-one years, wherefore he prays the court here to assign unto him A. B. of C. in the county of D. (*name his addition*) as the next friend of him the said \*G. G. the younger, to prosecute the said plaint in the nature and form aforesaid, against the said E. G. wherefore the said A. B. is admitted by the court here to prosecute the said plaint in the nature and form aforesaid, for the said G. G. the younger, who is an infant under the age of twenty-one years, against the said E. G.

(If Mrs. G. appears, here enter her appearance. If by attorney, it is in the common form, thus :)

E. G. puts in her place A. B. against the said G. G. the younger in a plea of land, and hereupon G. G. the younger, [*here follows the count.*]

Let this be entered upon the book immediately following the plaint; then let the demandant personally appear with his friend, and pray that the latter be admitted to prosecute for him, which the steward will then grant, and the remainder of the entry from the mark \* will be then inserted. The steward, upon the appearance of the tenant, or her attorney, will enter the appearance at his discretion. If there be no appearance, we may enter the default, and award the grand cape afterwards. J. J.

PROCEED-  
INGS ON  
WRITS OF  
ENTRY.

Count in  
same pro-  
ceedings  
(f).

Manor of C. in the } The general court baron, &c. &c. &c. the —  
county of H. } day of —, in the year of our Lord —.

G. G. the younger, by J. D. who is admitted by the court here to prosecute for the said G. G. the younger, who is an infant under the age of twenty-one years, as the next friend of the said G. G. the younger, demands against E. G. [two messuages, four barns, four stables, eight gardens, eight orchards, 100 acres of land, 100 acres of meadow, 100 acres of pasture, 100 acres of wood, 100 acres of furze and heath, and 100 acres of land covered with water,] with the appurtenances, in the parish and manor of C. in the said county of H. which he claims as his right and inheritance, to be holden of the lord of the said manor by the rod, at the will of the lord, according to the custom of the said manor, by the rent and services therefore due and accustomed; and into which said messuages, lands, tenements, and premises, with the appurtenances, the said E. G. hath not entry, but by G. G. the elder, to whom B. G. demised the same, who therefore unjustly, and without judgment disseised H. G. father of the said G. G. the younger, (of which said H. G. he the said G. G. the younger, as to the said messuages, lands, tenements, and premises, with the appurtenances, is heir according to the custom of the said manor) within fifty years now last past, &c. And thereupon he says, that the said H. G. father of the said G. G. the younger, (of which the said H. G. he the said G. G. the younger, as to the said messuages, lands, tenements, and premises, is heir, according to the custom of the said manor,) was seised of the said messuages, lands, tenements, and premises, with the appurtenances, in his demesne of fee and right, by the rod, at the will of the lord, according to the custom of the said manor, by the rent and services therefore due and accustomed in the time of peace, in the time of our lord the now king, by taking thereof esplees to the value, &c.; and from the said H. G. the right and inheritance, &c. descended to the said G. G. the younger, who now demands as son and heir, &c.; and into which, &c. and thereupon he brings suit, &c.

Instruc-  
tions.

After appearance entered, as ante, 1847, or otherwise, enter this count and let a copy of it be delivered to tenant's attorney, or to herself, if she appear in person and appoint no attorney.

Form of  
plaint as  
recorded.

Manor of C. in the } The general court baron of Sir G. W. P. bar-  
county of H. } lord, &c. held the — day of —, in the year of  
our Lord —, before J. J. gentleman, steward here.

Homage sworn { W. N.  
W. C.

G. G. the younger, comes to this court in his proper person, and complains against E. G. in a plea of land, to wit, [two messuages, four barns, four stables, eight gardens, eight orchards, 100 acres of land, 100 acres of meadow, 100 acres of pasture, 100 acres of wood, 100 acres of furze and heath, and 100 acres of land covered with water] with the appurtenances, in the parish and manor of C. in the said county of H. and the said G. G. the younger, hath found pledges to prosecute his plain

aforesaid, to wit, John Doe and Richard Roe, and he makes protestation to prosecute his said plaint of the premises aforesaid, with the appurtenances, in the nature and form of a writ of our lord the king, of entry *sur disseisin en le per & cui*, saying that the said premises, with the appurtenances, are the right and inheritance of him the said G. G. the younger, to be holden of the lord of the said manor, by the rod, at the will of the lord, according to the custom of the said manor, and into which said premises, with the appurtenances, the said E. G. hath not entry but by G. G. the elder, to whom B. G. demised the same, who thereof unjustly, and without judgment, disseised H. G. father of the said G. G. the younger (of which said H. G. he the said G. G. the younger, as to the said premises, with the appurtenances, is heir, according to the custom of the said manor), within fifty years now last past, &c. ; and thereupon the said G. G. the younger, prays process to be made to him against the said E. G. according to the custom of the said manor ; therefore, according to the custom of the said manor, it is commanded A. B. bailiff of the manor aforesaid, and officer of the said court baron, that according to the custom of the manor aforesaid, he summon, by good summoners, the said E. G. that she be at the next court baron, of Sir G. W. P. bart. lord of the said manor, to be held in and for the same, before J. J. gentleman, his steward there, of the manor aforesaid, on the — day of — next, to answer the said G. G. the younger, of the plea aforesaid, &c. The same day is given to the said G. G. the younger, here, &c.

PROCEEDINGS ON WRITS OF ENTRY.

Manor of C. in the } J. J. gentleman, steward of the court baron of  
county of H. } Sir G. W. P. bart. lord of the said manor, to A.  
B. bailiff of the same manor, greeting:—Whereas G. G. the younger,  
has complained against E. G. in a plea of land, in the parish of C. and  
manor aforesaid, which the said G. G. the younger claims as his right and  
inheritance, to be holden of the lord of the said manor, by the rod, at the  
will of the lord, according to the custom of the said manor, and hath made  
protestation to prosecute his said plaint in nature and form of a writ of  
our lord the king, of entry *sur disseisin en le per & cui*. And whereas  
J. D. has been assigned by the court as the next friend of him the said  
G. G. the younger, to prosecute the said plaint, in the nature and form  
aforesaid, against the said E. G., I therefore command you, that ac-  
cording to the custom of the said manor, you summon by good summon-  
ers the said E. G. that she be here at the next court baron of the said Sir  
G. W. P. bart. lord of the said manor, to be held in and for the said ma-  
nor, on — the — day of — next, at two o'clock at noon, at the  
house known by the name, &c. &c. within the said manor, to answer the  
said G. G. the younger, of the plea aforesaid, and how you shall have ex-  
ecuted this precept, certify to me at the same day and place, and have  
you then and there this precept. Given at the court baron of the ma-  
nor aforesaid, under my seal, this — day of — in the year of our  
lord —.

Steward's first summons (s).

[1849]

J. J. (L. S.)

To A. B. bailiff of the manor of C. }  
in the county of H. }

(s) See the returns thereto, ante, 1844, 5.

PROCEED-  
INGS ON  
WRITS OF  
ENTRY.

Adminis-  
tration of  
*prochein  
amic* for  
demand-  
ant, entry

of return  
of sum-  
mons, of  
default of  
tenant, and  
award of  
grand  
oape.

Manor of C. in the } The general court baron of Sir. G. W. P. bar-  
county of H. } lord of the said manor, here holden in and for the  
same manor, before J. J. gentleman, his steward there of the same ma-  
nor, on the — day of — in the year of our lord —.

Homage sworn { A. B.  
C. D.  
E. F., &c.

[\*1350]

And now here at this court comes the said G. G. the younger, in his proper person, and shows to the court here, that he the said G. G. the younger, is an infant under the age of twenty-one years; wherefore he prays the court here to assign unto him, J. D. of C. in the county of H. aforesaid, gentleman, as the next friend of him the said G. G. the younger, to prosecute his plaint against E. G. in a plea of land (to wit) [two messuages, four barns, four stables, eight gardens, eight orchards, 10 acres of land, 100 acres of meadow, 100 acres of pasture, 100 acres of wood, 100 acres of furze and heath, and 100 acres of land covered with water,] with the appurtenances, in the parish and manor of C. in the county of H. protesting to prosecute his said plaint of the premises aforesaid, with the appurtenances, in the nature and form of a writ of our lord the king, of entry *sur disseisin en le per & cui*, saying that the said messuages, lands, tenements, and premises, with the appurtenances, are the right and inheritance of him the said G. G. the younger, to be holden of the lord of the said manor, by the rod, at the will of the lord according to the custom of the said manor, by the rent and services therefore due and accustomed. And into which said messuages, lands, tenements, and premises, with the appurtenances, the said E. G. hath not entry, but by G. G. the elder, to whom B. G. demised the same, who thereof unjustly and without judgment, disseised H. G. father of the said G. G. the younger (of which said H. G. he the said G. G. the younger, as to the said messuages, lands, tenements, and premises, with the appurtenances, is heir, according to the custom of the said manor,) within fifty years now last past, &c. Wherefore the said J. D. is admitted by the court here to prosecute the said plaint in the nature and form aforesaid for the said G. G. the younger, who is an infant under the age of twenty-one years, against the said E. G. And it was commanded A. B. bailiff of the manor aforesaid, and officer of the said court baron, that according to the custom of the manor aforesaid, he should summon, by good summoners, the said E. G. to be here at this court, to answer the said G. G. the younger, in the said plea of land, by his said plaint, protesting to prosecute the same in the nature and form of a writ of our lord the king, of entry *sur disseisin en le per & cui*, according to the custom of the said manor, and now here at this court on this day, comes the said G. G. the younger, by the said J. D. his next friend aforesaid, and offers himself against the said E. G. of the said plea aforesaid, and she comes not, but makes default; and the said bailiff now here witnesseth, that he hath summoned, by good summoners, to wit, S. H. and W. C. good and lawful men of the manor of C. the said E. G. to be here at this court to answer the said G. G. the younger, in the plea aforesaid. Therefore, according to the custom of the manor aforesaid, it is considered, that the messuages, lands, tene-

PROCEED-  
INGS ON  
WRITS OF  
ENTRY.

ments, and premises aforesaid, with the appurtenances, be taken into the hand of the lord, &c. and the day, &c. And it is commanded to the said bailiff of the manor aforesaid, and officer of the said court baron, that according to the custom of the manor aforesaid, he summon, by good summoners, the said E. G. that she be at the next court baron of the said Sir G. W. P. bart. lord of the said manor, to be holden in and for the same manor, before J. J. gentlemen, his steward there, of the manor aforesaid, on the — day of — next, at two o'clock at noon, at the house known by the name, &c. &c. of C. aforesaid, to answer the said G. G. the younger, as well of the principal plea as of the default aforesaid. The same day is given to the said G. G. the younger here, &c.

Manor of C. in the } J. J. gentleman, steward of the court baron of Sir  
County of H. } G. W. P. bart. lord of the same manor, to A. B.  
bailiff of the same manor, greeting:—Take into the hand of the lord of  
the said manor, by the view of good and lawful men of the same manor,  
two messuages, four barns, four stables, eight gardens, eight orchards,  
100 acres of land, 100 acres of meadow, 100 acres of pasture, 100 acres  
of wood, 100 acres of furze and heath, and 100 acres of land covered  
with water,] with \*the appurtenances, in the said parish and manor of C. [\*1851]  
in the county aforesaid, which G. G. the younger, in the said court baron,  
claims against E. G. as his right and inheritance, to be holden of the  
lord of the said manor, by the rod, at the will of the lord, according to the  
custom of the said manor, by the rents and services therefore due and ac-  
customed, and the same taking, and the day thereof, make known to me,  
and summon, by good summoners, the said E. G. that she be here at the  
next court baron of the said Sir G. W. P. bart. lord of the said manor,  
to be holden in and for the said manor, on — the — day of —  
next thereupon, to answer and show, as well of the principal plea, as  
therefore she was not here at the last court, as she was summoned, and  
have you then there the names of those by whom you shall make this view  
and summons, and this precept. Given at the court baron of the manor  
aforesaid, under my seal, this — day of — in the year of our  
lord —.

Second  
summons.  
Return  
and in-  
structions  
as to pro-  
ceedings.

J. J. (L. S.)

By virtue of this precept to me directed, I have, on the — day of Return.  
— in the year within written, by the view of A. B. and C. D. good  
and lawful men of the manor of C. taken into the hand of the lord of the  
said manor, the messuages, lands, tenements, and premises, with the ap-  
purtenances, within written, as by the said precept I am within command-  
ed, and I have also summoned, by good summoners, to wit, E. F. and  
G. H. good and lawful men of the manor of C. the said E. G. that she  
be at the place and time within mentioned, to answer the within-named G.  
G. the younger, as I am within directed.

Summoners of the within-named E. G. { E. F.  
and  
G. H.  
The answer of A. B. bailiff.

PROCEED-  
INGS ON  
WRITS OF  
ENTRY.

Directions.

[ '1852 ]

The within process must be executed in the same manner as the original process in this suit was, as it is certainly doubtful whether the words "Take into the hands of the lord," are more than form. If the tenant make default again at the next court, and does not serve her former default, the demandant will have judgment of seisin. As to that part of this process which relates to the view, and taking the premises into the lord's hands, I cannot by any means discover the mode of executing it, but I rather think it may be best, in this instance, for the bailiff to take with him the viewers (who must be distinct men from the summoners) to the lands, and verbally take possession of them for the lord, when the viewers have viewed them.

J. J.

Entry of  
appear-  
ance of  
tenant—  
return of  
grand cape  
—release  
of default  
—count,  
and ten-  
ant's im-  
parlance.

Manor of C. in the } The general court baron of Sir G. W. P. baro-  
county of H. } net, lord of the said manor here holden, in and for  
the same manor, before J. J. gentlemen, his steward there, of the same  
manor, on the — day of — in the year of our Lord —.

And now here at this court comes the said G. G. the younger, by the said J. D. his next friend aforesaid, and offers himself against the said E. G. of a plea of [messuages, four barns, four stables, eight gardens, eight orchards, 100 acres of land, 100 acres of meadow, 100 acres of pasture, 100 acres of wood, 100 acres of furze and heath, and 100 acres of land covered with water,] with the appurtenances, in the parish and manor of C. in the said county of H. which he claims as his right and inheritance, to be holden of the lord of the said manor, by the rod, at the will of the lord, according to the custom of the said manor, by the rent and services therefore due and accustomed, and into which said messuages, lands, tenements, and premises, with the appurtenances, the said E. G. hath not entry but by G. G. the elder, to whom B. G. demised the same, who thereof unjustly, and without judgment, disseised H. G. father of the said G. G. the younger (of which said H. G. he the said G. G. the younger, as to the said messuages, lands, tenements, and premises, with the appurtenances, is heir, according to the custom of the said manor, within fifty years now last, &c.

[ '1853 ]

And the said E. G. being solemnly called, comes by T. S. her attorney, and the said E. G. heretofore, to wit, on the — day of — last past, made default hereafter she was summoned, &c. so that it was then commanded A. B. bailiff of the manor aforesaid, and officer of the said court baron, that he should take into the hands of the lord of the said manor the messuages, lands, tenements, and premises, with the appurtenances aforesaid, &c. and the day, &c. and that, according to the custom of the manor aforesaid, he should summon, by good summoners, the said E. G. to be here at this day, to wit, on the — day of — in the year of our Lord — then next following to answer the said G. G. the younger, as well of the principal plea as of the default aforesaid, &c. And the bailiff now here witnesseth the day of the taking, &c. and the summons, &c. and thereupon the said G. G. the younger, by the said J. D. his next friend in court, here remits and releases to the aforesaid E. G. her default aforesaid, which she made here on the said — day of — last past, and the said G. G. the younger, by the said J. D. his



said next friend, demands against the said E. G. two messuages, &c.— *(Go on with the count to the end; and after the words "suit, &c." add an imparlance, thus :)* PROCEEDINGS ON WRITS OF ENTRY.

And the said E. G. prays leave to imparl thereto here until the next court baron of the said Sir G. W. P. baronet, lord of the said manor, to be holden in and for the same manor, before J. J. gentleman, his steward there, of the manor aforesaid, on — the — day of — next. And she hath it, &c. The same day is given to the said G. G. the younger, here, &c. Impar-  
lance.

N. B. This suit was afterwards compromised, but see another imparlance and plea below.

Manor of C. in the } The general court baron, &c. (the usual title) on Another  
Impar-  
lance.  
county of H. } the — day of — in the year of our Lord —.

And now here at this court comes as well the said G. G. the younger, by the said J. D. his said next friend, as the said E. G. by the said T. S. her attorney aforesaid. And the said E. G. further prays leave to imparl to the count aforesaid here until the next court baron of the said Sir G. W. P. baronet, lord of the said manor, to be holden in and for the same manor, before J. J. gentlemen, his steward there, of the manor aforesaid, on the — day of — next, and she hath it, &c. The same day is given to the said G. G. the younger, here, &c.

Manor of C. }  
in the county of H. }

G. }  
at the suit of } And the said E. G. by T. S. her attorney, comes Tenant's  
plea (h).  
[ "1854" ]  
G. } and defends her right when, &c. and "says, that the

(A) In a writ of entry *sur abatement*, in the *one and per*, the demandant, by his count, demanded six messuages, six mills, two barns, two stables, six out-houses, six yards, two gardens, two orchards, one hundred acres of arable land, one hundred acres of meadow land, one hundred acres of pasture land, one hundred acres of woodland, one hundred acres of underwood, one hundred acres of land covered with water, and one hundred acres of other land, with the appurtenances, and stated his title, as cousin and heir of one R. S., upon whose death one R. T. abated, and devised the estate to R. D. C. and S. his wife, by whom the tenant had entry. The tenant as to the said messuages, mills, barns, stables, out-houses, gardens and orchards, and thirty acres of land, thirty acres of meadow, and thirty acres of pasture, with the appurtenances, *parcel of the said land in the said count mentioned*, said that the demandant ought not to have his claim of the messuages or tenements, with the land and appurtenances in the said count mentioned, or any part thereof; and pleaded that R. S. being seised of the messuages, &c. devised the same to R. T. in fee, that R. T. be-

came seised of the messuages, and afterwards devised them to S. the wife of R. D. C. and her heirs forever; that R. D. C. and S. his wife, in right of the said S. thereby became seised in fee, and afterwards levied a fine to the tenant with proclamations "of all the said tenements in the introductory part of the plea mentioned, and the land whereon the said buildings now stand, by the description of four messuages, one cloth mill, four barns, four stables, one wharf, four curtilages, four gardens, four orchards, thirty acres of land, thirty acres of meadow, and thirty acres of pasture, with the appurtenances," as by the said fine and proclamation made thereon now remaining of record in the court of the Bench here more fully appears. The tenant then averred that after the levying of the fine he entered into the messuages, &c. and concluded his plea by praying judgment "if the demandant ought to have his seisin of and in the messuages or tenements with the land and appurtenances in the said count mentioned. To this plea the demandant demurred specially, assigning for causes; first, that the plea was double, for alleging the devise by R. S. to R.

PROCEED-  
INGS ON  
WRITS OF  
ENTRY.

said G. H. the father of the said G. G. the younger, was not seised of the said messuages, lands, tenements, and premises, with the appurtenances, in manner and form as the said G. G. the younger, by his plaint and declaration above supposes. And of this she puts herself upon the country, &c.

## [\*1855] \*PROCEEDINGS RELATIVE TO WRITS OF RIGHT.

*Præcipe*  
for writ at  
suit of  
husband  
and wife  
(a).

*Berkshire*, to wit.—Command C. D. (z) (*the tenant of the freehold*), that justly and without delay, she render to A. B. and E. his wife, [four messuages, four gardens, and four acres of land,] with the appurtenances, in the parish of T. in Berkshire, which they claim to be the right and inheritance of the said E. Returnable on ——— (*a general return day*.)

Writ of  
right, *quia*  
*dominus*  
*remitit cur-*  
*riam* (c).

William the Fourth, by the grace of God, of the United Kingdom of Great Britain and Ireland king, defender of the faith, &c. to the sheriff of [Sussex,] greeting:—Command C. D. (b) that justly and without delay, he render unto A. B. [one piece of garden ground, containing in length 59 feet, and in breadth 27 feet, and one curtilage,] with the appurtenances in the borough of H. which the said A. B. claims to be his right and inheritance, and to hold of us in chief (d), and whereof he complains that the said C. D. unjustly deforces him, and unless he shall do so; and if the said A. B. shall give you security to prosecute his claim, then summons,

T. and by R. T. to S. the wife of R. D. C. and also the fine levied by R. D. C. and S. his wife to the tenant, either being a sufficient answer; *secondly*, that though the plea began by selecting *part* only of the premises mentioned in the count, it averred that the demandant ought not to have seisin of the messuages, &c. or any part thereof, and concluded by praying judgment of *all*; *thirdly*, that the *fine*, as pleaded, appeared not to have been levied of *all* the tenements in the introductory part of the plea mentioned, and as to which the plea was pleaded; and *lastly*, that the plea did not verify the *fine*, by the record thereof, but concluded with the general verification and prayer of judgment; the tenant thereby attempting to put in issue matter of record, and make it triable *per pais*:—held, that the plea was good, 1 M. & P. 102.—4 Bing. 428, S. C.

(a) See form, 2 Saund. 45, n. 4. Formerly it was usual to proceed by writ of right out of the lord's court, which was from thence removed into the county court, and afterwards into the Common Pleas; but the modern practice is to make the writ of right returnable immediately in the Common Pleas; and now it is not even necessary in the writ to insert the

words *quia dominus remittit curiam*; see Booth on Real Actions, 91.—2 Saund. 45, n. 4.—Fitz. N. B. 5, F. 6 B. 7th ed. The proceedings in a writ of right are very ably pointed out in Lee's Dict. Pract. tit. "Right," 2d edit. As to the four knights, and the trial of the writ of right, see 2 C. & P. 187.—1 M. & P. 2.

Leave has been given to amend where blanks were left for the name of the demandant's attorney, and for the word "*esplees*," 2 M. & P. 478.

A writ of right lies for tithes, 82 Hen. 8, c. 7, s. 7.—Toller on Tithes, 19.—Adams on Eject.—But see Roscoe on Real Actions, 23.—Fitz. N. B. 1 B.

(z) See post, 1855, note b.

(b) A misnomer of the christian name of the tenant can only be taken advantage of by plea in abatement, 2 M. & P. 818.

(c) See forms, 8 Wils. 559.—10 Went. 218.—Com. Dig. Droit, C. (c. 1).—Booth on Real Actions, 91.—See also a form at the suit of assignees of a bankrupt, 2 Hen. Bla. 444.

(d) These latter words are unnecessary, 2 Saund. 45, note 4.

by good summoners, the said C. D. that he be before our justices at Westminster, on — (*a general return day*), to show wherefore he hath done it, and have you there the summoners and this writ. Witness ourselves at Westminster, on the — day of — in the — year of our reign. Because C. D. of N. chief lord of that fee, hath thereof remitted to us his court (e).

PROCEEDINGS  
RELATIVE  
TO WRITS  
OF RIGHT.

"E. F. sheriff of — to G. H. and I. K. my bailiffs for this time [ \*1356 ] only, greeting:—By virtue of a writ of right of patent of our lord the king, to me directed, I command you that you command C. D. that justly and without delay (*here the writ is recited*), and unless he shall do it, then summon the said C. D. that he be before our justices at Westminster on — (*the return of the writ*), to show wherefore he will not do it, and that after the said summons is made, you do, at the most usual door of the parish church of the parish of — on Sunday next after the said summons, immediately after divine service is ended, proclaim the said summons, according to the form of the Statute in such case made and provided. Given under the seal of my office, the — day of — in the — year of the reign, &c.

Warrant  
to the bailiff (f).

By the same sheriff.

By virtue of his majesty's writ of right patent, to the sheriff of — directed, and by virtue of the said sheriff's warrant to us directed, we do hereby require and command you, that you render to A. B. (*&c. as in the writ*), as he alleges and complains, that you the said C. D. keep him out of the same, and if you refuse so to do, then we do hereby summon you, that you be and appear before his majesty's justices at Westminster, on — (*the return of the writ*), to show cause why you do not.

The form  
of the bailiff's  
summons (g).

(Signed) G. H.  
and  
I. K.

\*Received —

Pledges of prosecution, { John Doe,  
and  
Richard Roe.

Summoners of the within named C. D. { G. H.  
and  
I. K.

[ \*1357 ]  
Sheriff's  
return in-  
dorsed on  
the writ  
(h).

And after the aforesaid summons made, to wit, at the most usual door of the parish church of — within specified, within which the tenements within mentioned do lie, upon the Lord's day, to wit, the — day of — in the year of our Lord — immediately after divine service and

(e) The insertion of the latter words is not now necessary; see the preceding note, and should be omitted if the words "and to hold us in chief," be inserted, 2 Saund. 45, n. 4.

nearly the same as in dower, ante, 1312, 18, and see the observations, 2 Saund. 45, note 4.

(g) See 2 Saund. 45, note 4.—Lee's Dict. Prac. 2d edit.

(f) The warrant and proceedings are

(h) See next form, and note,

PROCEED-  
INGS  
RELATIVE  
TO WRITS  
OF RIGHT.

The return  
indorsed  
on the writ  
of right  
(i).

sermon in the said church was ended, I made proclamation of the said summons, according to the form of the Statute in such case made and provided.

E. F. sheriff.

Pledges to prosecute, { John Doe,  
and  
Richard Roe.

The summoners of the within-named C. D. are { E. F.  
and  
G. H.

And at the most usual door of the parish church of — within mentioned, on Sunday, the — day of — in the year within written, immediately after divine service and sermon ended, I did cause public proclamation to be made, according to the form of the statute in such case made and provided.

The answer of { J. W. esq.  
and  
J. B. esq. } sheriff.

Form of  
entry of *ne*  
*recipiatur*.

*Staffordshire* :—*Ne recipiatur* to be entered against the tenant C. D. claiming his essoign to a writ of right at the suit of A. B. demandant. Dated, &c.

M. & S. attornies for the demandant.

Form of  
entry of a  
common  
essoign (k).

In (or on the return of writ) (county) essoign for C. D. at the suit of A. B.  
(Date.) In right.

Rule given  
by clerk of  
the es-  
soigns and  
written  
following  
the preced-  
ing entry  
(l).

Unless the plaintiff adjourns the essoign within — days after — next, after — days of —, a *non pros* will be entered.

On — (general return-day,) in — Term, in the 1st year of the reign of King William the Fourth.

"The tenant's essoign, at the instance of the demandant, is adjourned until the — (general return-day.)

[\*1358]

B. W. clerk of the essoigns.

Entry of  
adjourn-  
ment of  
tenant's  
essoigns  
(m).

Essoign adjourned until —

By E. F. attorney for the demandant.

William the Fourth, &c. to the sheriff of [Middlesex,] greeting :—  
Take into our hands by the view of honest and lawful men of your coun-

(i) 8 Wils. 553.—2 Saund. 45, note 4.  
(k) See 2 Saund. 45, note 4.—Lee's Dict. Prac. 2d edit. vol. ii.

(l) See Lee's Dict. Prac. 2d edit. vol. ii. tit. "Right."

(m) See a form, 10 Wentw. 220, and 2 Saund. 45, note 4.

(n) See Lee's Dict. Prac. 2d edit.

(o) 8 Wils. 558; see 2 Saund. 45, n. 4. and similar forms and proceedings in dower, 1814. If C. D. the tenant having been legally summoned, do not appear at the return-day on the original writ, but makes default thereupon, a writ of grand cape is to be issued, the tenor whereof is as above.

Entry of  
adjourn-  
ment of es-  
soign (n).  
The writ  
of grand  
cape (o).

ty, [ten messuages, ten gardens, &c.] with the appurtenances, in the parish of St. John, Hackney, which Francis John Tessin, esquire, in our court before our justices, claims to be his right and inheritance, and to hold of us in chief, and whereof he complains that C. D. unjustly deforme him by our writ of right through the default of the said C. D. and the day of the caption made known to our justices at Westminster, by your letters sealed, and summon by good summoners the said C. D. that he be before our justices at Westminster, on — (general return day,) thereof to answer and to show wherefore he was not in our court, before our justices at Westminster, on — last past, as he was summoned, and have you there the names of those by whose view you shall have done this, the summoners, and this writ. Witness, Sir N. C. T. at Westminster, the — day of — in the — year of our reign.

PROCEED-  
INGS RELAT-  
-GIVE TO  
WRITS OF  
RIGHT.

By virtue of this writ to me directed, on the — day of — in the year within written, I have taken into the hands of our lord the king, by the view of — and — good and lawful men of my county, the — lands and tenements within mentioned, with the appurtenances, as I am within commanded, and I have, by — and — given notice to the within-mentioned C. D. to be and appear before his majesty's justices at Westminster, at the time and place within mentioned, as I am also within commanded.

To sheriff's  
return in-  
dorsed on  
this writ  
(p).

[\*1359]

Summoners of the within-named C. D. { L. M.  
and  
O. P.  
— Sheriff.

In the Common Pleas.

— Term, — Will. 4.

*Berkshire, to wit.*—A. B. and E. his wife, by —, their attorney, demand against C. D. widow, [four messuages, four gardens, and four acres of land,] with the appurtenances, in the parish of —, in the county of —, which they the said A. B. and E. claim to be the right and inheritance of her the said E. by writ of our said lord the king of right, and whereupon they say that they themselves were seised of the tenements aforesaid, with the appurtenances, in their demesne as of fee and right, in right of her the said E. in the time of peace, in the time of our present sovereign lord the king, within thirty (r) years last past by taking the esplees (s) thereof, to the value, &c. and that such is their right they offer, &c.

Count by  
husband  
and wife  
on the  
husband  
and wife's  
seisin (q).

—, to wit.—A. B. — by —, his attorney, demands against C. D. [the premises, as in the writ] in the county of —, which he the said A. B. claims to be the right and inheritance of him the said A. B. by

Count in  
writ of  
right on  
the de-  
mandant's  
own seisin  
(t).

(p) See form, Lee's Dict. Prac. 2d edit; and in dower, and *alias cape*, ante, 1314. and 2 Saund. 45, note 4.

(q) See forms, 2 Saund. 45, note 4. East. Est. 241 a.—Co. Ent. 182. At the suit of assignees of a bankrupt, see 2 Hen. Bla. 444.

(r) See Crq. Jac. 292, and Yelv. 211. Error was assigned because the demandant did not say in his count, *within thirty years last past*, because the statute of limitations, 82

Hen. 8, c. 2, renders it necessary to bring a writ of right on demandant's own seisin within thirty years, and upon the seisin of his ancestor within sixty years, 1 Bulst. 161.—2 Saund. 45, note 4.

(s) What a taking of the esplees, see 8 B. & C. 302.—Ante, 1339. In 2 M. & P. 478, an amendment was allowed where a blank was left for the word "*esplees*."

(t) See the preceding form, and note.

PROCEED-  
INGS  
RELATIVE  
TO WRIT  
OF RIGHT.

writ of our said lord the king of right, and whereupon he says, that he himself was seised of the tenements aforesaid, with the appurtenances, in his demesne as of fee and right, in the time of peace, in the time of our present sovereign lord the king, to wit, within thirty years last past, by taking the esplees (u) thereof to the value, &c. and that such is his right he offers, &c.

[\*1360]  
Count on  
seisin of  
demand-  
ant's fath-  
er (w).

\**Sussex*, to wit.—A. B. esquire, by —, his attorney, demands against C. D. [one piece of garden ground, containing in length fifty-nine feet, and in breadth twenty-seven feet, and one curtilage,] with the appurtenances, in the borough of —, as his right and inheritance, by the writ of the lord the now king of right, and thereupon the said A. B. says, that E. F. esquire, deceased, the late father of the said A. B. was seised of the piece of garden ground and curtilage aforesaid, with the appurtenances, in his demesne as of fee and right (x), in the time of peace, in the time of the lord George the Third, late king of Great Britain, to wit, within sixty years now last past, by taking the esplees thereof to the value, &c. and from the said E. F. the right descended to the said A. B. who now demands the same as son and heir of the said E. F. and that such is his right he offers, &c.

Another  
form of  
count on  
seisin of  
demand-  
ant's an-  
cestor (y).

[*Proceed as in the form, ante, 1359, to the asterisk, and then as follows* :]—And thereupon they say, that E. F. deceased, whose heir the said E. is, was seised of the tenements aforesaid, with the appurtenances, in his demesne as of fee and right (z), in the time of peace, in the time of the lord George the Third, late king of Great Britain, to wit, within sixty years now last past, by taking the esplees and profits thereof to the value, &c. and from him the said E. F. because he died without issue, the right of the tenements aforesaid, with the appurtenances, descended to G. H. his brother an heir, and from the said G. H. the right of the tenements aforesaid, with the appurtenances, descended to I. K. the son and heir of the said G. H. and from the said I. K. the son, the right of the same tenements, with the appurtenances, descended to the said E. daughter and heir of the said G. H. and wife of the said A. B. who now demand the same; and that such is their right, the offer, &c.

[\*1361]  
Count on a  
seisin of  
plaintiff's  
father and  
mother, in  
right of the  
mother.

\*—, to wit.—A. B. by —, his attorney, demands against C. D. two messuages, two gardens, &c. [*describe them*] with the appurtenances, in the parish of —, as his right and inheritance, by the writ of our lord the king of right, and thereupon he saith, that E. F. and G. his wife, father and mother of the said A. B. the new demandant, and who are both dead, were in their life-times seised of the tenements aforesaid, with the appurtenances, in their demesne as of fee and right of the said G. in the time of peace, in the time of the lord George the Third, late king of

(u) See ante, note s.

(w) This form was settled by two very eminent Pleaders at the bar. See another form, 8 Wils. 419. 561.—3 B. & P. 458, and next form. The demandant who counts on seisin of his ancestors must show *how* he is heir, 8 B. & P. 458.—2 Saund. 45 a, in notes, and

see ante, 671, note.

(x) The words "of right" are necessary, see 5 East, 372.

(y) See a form, 2 Saund. 45, note 4.

(z) As to these words which are necessary, see 5 East, 272.

Great Britain, to wit, within sixty years now last past, by taking the esplees thereof to the value, &c. and from the said G. the right descended to the said A. B. who now demands the same, as son and heir of the said G.; and that such is his right he offers, &c.

PROCEED-  
INGS REL-  
ATIVE TO  
WRITS OF  
RIGHT.

*Devon*, to wit.—A. B. by ———, his attorney, demandeth against C. D. [the manor of Burneby, otherwise Burnebury, with the appurtenances, eight messuages, eight cottages, eight barns, eight stables, eight curtilages, eight gardens, eight orchards, 400 acres of land, 400 acres of meadow, 400 acres of pasture, 400 acres of wood, 400 acres of furze and heath, and 200 acres of land covered with water,] with the appurtenances, in the parishes of Bratton, Clovelly, Breadwood, Widger, and Trusleton, in the county aforesaid, as his right and inheritance, by writ of the lord the king of right, and thereupon he saith, that E. F. widow, long before the making the devise hereafter mentioned, was seised in her demesne, as of fee, of and in the premises hereafter mentioned (b), and being so seised thereof, afterwards, and \*by her last will and testament in writing, bearing date the ——— day of ———, in the ——— year of the reign of our late sovereign lady, by the grace of God, of England, Scotland, &c. queen, defender, &c. gave, devised, and bequeathed, unto G. H. son of I. K. all the messuages, lands, and tenements, annuities, rents, reversions, and services, with their and every of their appurtenances, within the parishes of Bratton, Clovelly, Breadwood, and Widger, and elsewhere, within the limits of Cornwall and Devon, whereof the aforesaid manor and tenements, with the appurtenances, above demanded, were and are part and parcel, to have and to hold to him the said G. H. and the heirs male of his body lawfully begotten, or to be begotten, and for want of such issue, then to the second, third, fourth, fifth; sixth, and seventh, youngest son of the said I. K. and younger brothers, to the said G. H. and the heirs male of such of his younger brothers, and his and their issue male that should be in priority of birth and seniority of age, the elder of such of his younger brothers, and his heirs male to be always preferred before either brothers, and heirs male, and for want of issue male in the said G. H. and all his younger brothers, then to L. B. gentleman, grandfather of the said A. B. the now demandant, by the name and description of L. B. of, &c. gentleman, my kinsman, and to the right heirs of the said L. B. for evermore; and the said A. B. the demandant, further saith, that the said E. F. having made such her will as aforesaid, afterwards, to wit, some time in the year of our Lord ———, died; without altering or revoking the same, upon whose death the manor and tenements aforesaid, with the appurtenances, by virtue of the said will, came to the aforesaid G. H.; and the said A. B. the now demandant, further saith, that the aforesaid G. H. and all his younger brothers, died without issue male, and the remainder in the said tenements, with the appurtenances, not having been barred according to the law of this realm, the fee-simple and inheritance of and in the manor and tenements aforesaid, with the appurtenances, vested in N. B. the eldest son, and heir-at-law of the said L. B. and first devise in remainder

Count by  
the heir of  
a devisee  
(a).

[\*1862]

(a) From Mr. Serjeant Bond's MSS. See a count by a demandant claiming title under a devise, and plea thereto, 10 Wentw. 218.

(b) *Quere*, if the words "by taking the esplees thereof to the value, &c. within sixty years last past," ought not to be inserted.

PROCEED-  
INGS RELA-  
TIVE TO  
WRITS OF  
RIGHT.

named in the said will, which said N. B. died sometime in the year of our Lord —, and by virtue of the said will the said N. B. had seisin and right of possession of and in the manor and tenements aforesaid, with the appurtenances, in the time of peace, in the time of the lord George the Third, king of Great Britain, &c. [to wit, within sixty years now last past, by taking the esplees thereof (c) to the value, &c. within the aforesaid sixty years, by virtue also of the said will, and from the said N. B. the right descended to the said A. B. the now demandant, who, as son and heir of the said N. B. now demands the same; and that such is his right he offers suit, &c.]

Form of  
demanding  
a view af-  
ter the  
count (d).

[\*1363]

The like in  
another  
form (e).

And the said C. D. by — her attorney, comes and defends her right, when, &c. and demands a view of the tenements aforesaid, with the appurtenances, and she has it, and a day is given to the said parties here, until, &c. and in the mean time, &c.

And the said C. D. by R. T. his attorney, comes and demands that he may have a view of the tenements aforesaid, with the appurtenances, whereof, &c.

Demand  
of view in  
another  
form (f).

In right.

C. D. the tenant,  
ats.

— Term, — Will. 4.

A. B. the demandant. } And the said C. D. (*the tenant*), by L. M. his attorney comes and defends the right, when, &c. and demands a view of the tenements aforesaid, with the appurtenances, &c. [and he has it, &c.; a day is given to the said parties here until, &c.; and in the mean time, &c. (g)].

Writ of  
view (h).

[\*1364]

William the Fourth, &c. to the sheriff of Sussex, greeting:—We command you, that without delay you cause C. D. \*widow, to have a view of

(c) What a sufficient taking, see 6 B. & C. 302.—Ante; 1839.

(d) See form, 2 Saund. 45 b, n. 4.—Booth on Real Actions, 40; and see form, Willes, 844.—See also the next form, and note.

(e) See forms, 2 Saund. 45 b, n. 4.—Booth on Real Actions 40, and the form of the demand and counterplea of view in *formadon*, Willes, 844. When the tenant appears according to the exigency of the writ, he may pray a view, either before or after the count, and after imparlance, Willes, 844.—2 Saund. 45, n. 4, and *id.* 45 h.

(f) See Lee's Dict. Prac. 2d edit. vol. ii.

(g) The words between the brackets are not part of the demand.

(h) This form was settled by two eminent Pleaders at the bar. See 2 B. & P. 384.—See another form, 2 Saund. 45 b, note 4.—Booth on Real Actions, 39, 40. The following observations and directions were made by the Pleaders who prepared the writ. There must be nine returns between the teste and return of a writ of view, and they must be filled up in the draft accordingly. Perhaps the signer and sealer of the writ may not object to it, even if the teste were filled up as of last Trinity Term. The demandant, or his agent

must be prepared to point out the land in question to the sheriff, in order that he may show it to the tenant and the viewers or four knights (who need not really be knights) and the sheriff must give the tenant (*the defendant*) notice of the time when view will be given, which may be at any time before the return. It may not be improper for the demandant's agent to serve the tenant or his attorney immediately with an appointment corresponding with the one made by the sheriff. The sheriff's summons should be served upon the defendant himself, if resident within the county, but if not it can only be left upon the premises demanded, in which case the notice to attorney will be peculiarly requisite. The return must depend on the tenant's (*the defendant*) attending or not attending, by himself or his agent, to take the view, which the demandant's agent must be prepared to give with accuracy and in exact conformity to the description in the writ. After the return the tenant is at liberty to cast another assign, which must be adjourned for at least fifteen days more, but if not cast on the very day, a *ne recipiatur* may be entered with the clerk of the escheigns. See 1 Saund. 45, note 4, and *id.* 45 b, c.



one piece of garden ground, containing in length 59 feet, and in breadth 21 feet, and one curtilage, with the appurtenances, in the borough of H. which A. B. in our court, before our justices at Westminster, claims as his right and inheritance, by our writ of right, and appointed four knights of those present at the view, to be before our said justices at Westminster, in 15 days of Easter, to testify such view, and have you then there the names of those knights, and this writ.

Witness, Sir N. C. Tindal, knt. at Westminster, the — day of — in the 1st year of our reign.

William the Fourth, &c.—We command you, that without delay you cause C. D. widow, to have a view of [four messuages, four gardens, and four acres of land,] with the appurtenances, in the parish of T. which A. B. and E. his wife, in our court, before our justices at Westminster, claim to be the right and inheritance of the said E. against the said C. D. by our writ of right, and inform four knights of those who shall be present at that view, that they be before our justices at Westminster (on such a day) to testify such view, and have the names of the knights, and this writ.

Witness, Sir N. C. Tindal, knt.  
at Westminster.

PROCEED-  
INGS RELA-  
TIVE TO  
WRITS OF  
RIGHT

The like  
writ of  
view in  
another  
form (†).

By virtue of this writ I humbly certify to the justices within named, that I caused C. D. in the writ within named, to have a view of the tenements aforesaid, with the appurtenances within specified, in the presence of, &c. (naming *them*), four knights of my county, who were present at the said view, and I have summoned the said knights to appear before our said lord the king's justices, at Westminster, on the day in the said writ within specified, to testify the said view, as by the said writ I am within commanded.

E. F. sheriff.

Return to  
writ of  
view, that  
defendant  
did not ap-  
pear to  
show the  
land (k).

[1365]

By virtue of this writ, I certify to the justices within written, that none on the part of the said A. B. came to show me the messuages, &c. with the appurtenances within written; therefore nothing has been as yet done by me for the execution of this writ.

E. F. sheriff.

Return  
that de-  
mandant  
did not ap-  
pear to  
show the  
land (l).

In the common Pleas.

— Term, — Will. 4.

And the said C. D. (*the tenant*), by E. F. his attorney, comes and says, that before the day of suing forth the original writ of him the said A. B. one G. H. was seised (*here the matter of fact must be stated as it is*), without whom he the said C. B. cannot bring the tenements aforesaid, with the appurtenances, into plea, nor answer the said A. B. thereof and he prays aid of him the said G. H. and it is granted to

Entry of  
prayer in  
aid (m).

(†) See 2 Saund. 45 b, note 4.—Booth on Real Actions, 96.—Lee's Dict. Prac. vol. ii. 2d ed. tit. "Right."

(k) See form, 2 Saund. 45 b, n. 4.—Lee's Dict. Prac. vol. ii. 2d ed. tit. "Right."

(l) See Booth on Real Actions, 41.—Upon this return an *alias* writ of view is issued, Id. 40.—2 Saund. 45 b, n. 4.

(m) See Lee's Dict. Prac. vol. ii. 2d ed. tit. "Right."—2 Saund. 45 c, in notes.

PROCEED-  
INGS RELAT-  
IVE TO  
WRITS OF  
RIGHT.

him, &c. therefore the sheriff is commanded, that he summon by good summoners, the said G. H. that he be here on, &c. to join, together with the said C. E. in answering the said A. B. in the plea aforesaid, of, &c. the same day is given to the parties aforesaid, here, &c.

Plea de-  
ducing the  
title of the  
remainder-  
man, and  
praying  
his aid (n).  
[\*1366]

C. D. }  
ats. } And the said C. D. by — her attorney, comes and says, that  
A. B. } before the day of suing forth the original writ of them the said  
A. B. and E. his wife, one A. M. gentleman, was seised of the tenements  
aforesaid with the appurtenances, in his demesne, as of fee; and being so  
thereof seised, he the said A. M. afterwards, to wit, on the — day of  
— in the year of our lord — at the parish \*aforesaid, duly made his  
last will and testament, in writing, and thereby gave and devised the  
tenements aforesaid, with the appurtenances, to the said C. D. for the term  
of her life, the remainder thereof, after the death of her the said C. D. to  
H. M. and his heirs forever, and afterwards, and before the day of suing  
forth the said original writ, the said A. M. at the parish aforesaid died,  
in form aforesaid seised of the tenements aforesaid, with the appurtenances,  
after whose death she the said C. D. entered into the tenements aforesaid,  
with the appurtenances, and was seised thereof in her demesne, as of  
freehold for the term of her natural life, the remainder thereof after her  
death in form aforesaid belonging to the said H. M. and his heirs, and so  
she the said C. D. says, that she holds, and on the day of suing forth the  
original writ of the said A. B. and E. did hold, the tenements aforesaid, with  
the appurtenances, for the term of her life, the remainder thereof to the  
said H. M. and his heirs for ever, without whom she the said E. cannot  
bring the tenements aforesaid, with the appurtenances, into plea, nor an-  
swer the said A. B. and D. thereof, and she prays aid of him the said H.  
M. and it is granted to her, &c. Therefore the sheriff is commanded,  
that he summon, by good summoners, the said H. M. that he be here from  
the day of Easter in 15 days, to join together with the said C. D. in an-  
swering the said A. B. and E. in the plea aforesaid, if, &c. the same day  
is given to the parties aforesaid here, &c.

Plea pray-  
ing in aid  
the re-  
mainder  
man (o).  
[\*1367]

C. D. }  
ats. } And the said C. D. by — his attorney, comes and says,  
A. B. } that long before the day of suing out the \*original writ of the  
said A. B. the right honorable C. lord viscount I. of the kingdom of  
Scotland, was seised of the tenements aforesaid, with the appurtenances, in  
his demesne as of fee, and being so seised thereof, on, &c. in the year of our  
Lord — made his last will and testament in writing, and thereby gave  
and devised the said tenements, with the appurtenances, unto the right hon-  
orable lord S. and C. S. esquire, both since deceased, and their heirs, to  
the use of his wife, the right honorable F. lady viscountess I. for the term  
of her natural life, the remainder thereof to the use of the said lord S. and  
C. S. and their heirs, during the natural life of the said viscountess, the

(n) See forms, 2 Saund. 45 c. n. 4, and Co. Ent. 49 a, 182 b, 827 a, 841 a.

(o) See forms, &c. 2 B. & P. 884. The plea there was demurred to, because it was

pleaded after a general imparlance, and the court gave judgment that the tenant should answer alone.

PROCEED-  
INGS REL-  
ATIVE TO  
WRITS OF  
RIGHT.

remainder thereof to the use of his daughter I. A. lady B. for the term of her natural life; the remainder thereof to the use of the said lord S. and C. S. and their heirs, during the natural life of his said daughter I. A.; the remainder thereof to the use of the second, third, and every other son of the said I. A. (except the eldest son, or such as should become an eldest son;) and the heirs male of their bodies severally issuing; the remainder thereof to the use of the said lord S. and C. S. and their heirs, during the natural life of his said daughter F.; the remainder thereof to the use of the first, second, and every other son of his said daughter F. and the heirs male of their bodies severally issuing; the remainder thereof to the use of his daughter E. for the term of her natural life; the remainder thereof to the use of the said lord S. and C. S. and their heirs, during the natural life of his said daughter E.; the remainder thereof to the use of the first, second, and every other son of his said daughter E. and the heirs male of their bodies severally issuing; the remainder thereof to the use of his daughter H. for the term of her natural life; the remainder thereof to the use of the said lord S. and C. S. and their heirs, during the natural life of his said daughter H.; the remainder thereof to the use of the first, second, and every other son of his said daughter H., and the heirs male of their bodies severally issuing; the remainder thereof to the use of his daughter L. S. for the term of her natural life; the remainder thereof to the use of the said lord S. and C. S. and their heirs, during the natural life of his said daughter L. S.; the remainder thereof to the use of the first, second and every other son of his said daughter L. S. and the heirs male of their bodies severally issuing; the remainder thereof to his own right heirs. And the said lord viscount I. afterwards, and before \*the day of suing out of the said original writ of the said A. B. at the borough of H. aforesaid, died seised of the said tenements, with the appurtenances, in form aforesaid, after whose death the said viscountess entered into the tenements aforesaid, with the appurtenances, and was seised thereof in her demesne as of freehold, for the term of her natural life; the remainder thereof after her death belonging as aforesaid. And the said viscountess being so seised, afterwards, and before the day of suing out the original writ of the said A. B. to wit, on, &c. in the year of our Lord — at the borough of H. by a certain indenture, then and there made between the said viscountess and the said C. D. for and in consideration of the sum of five shillings, to her before then paid by the said C. D. bargained and sold the said tenements, with the appurtenances, to the said C. D. to hold to him for the term of one year next ensuing. By virtue whereof, and of the Statute made for transferring uses into possession, the said C. D. became lawfully possessed of the said tenements, with the appurtenances, for the term aforesaid, the reversion thereof belonging to the said viscountess for her natural life. And being so possessed thereof, afterwards, to wit, on, &c. in, &c. last aforesaid, at the borough of H. aforesaid, by a certain other indenture then and there made between the said viscountess and the said C. D. she the said viscountess released to the said C. D. the said reversion, to hold the same to the use of the said C. D. during the joint lives of her the said viscountess and of the said C. D. By virtue whereof, and of the Statute made for transferring uses into possession, the said C. D. became, and was, and yet is, seised of the aforesaid tenements, with the appurtenances, in his demesne

[\*1368]

PROCEED-  
INGS RELAT-  
IVE TO  
WRITS OF  
HABEAS.

as of fee, held, for the term of the joint natural lives of the said viscountess and of himself, the remainder thereof belonging as aforesaid. And the said C. D. further saith, that the said I. A. lady B. hath not any second son of her body lawfully issuing, nor hath the said F. any son of her body lawfully issuing. And the said C. D. further says, that the said E. afterwards, and before the issuing out of the original writ of the said M. at the borough of H. aforesaid, intermarried with one H. M. esquire, and the said H. and E. had issue between them lawfully begotten, one H. M. their first son, who is now living, to whom, and to the heirs male of his body issuing, the tenements aforesaid, with the appurtenances, after the death of the said viscountess, and after the respective deaths of the said I. A. and E. and in default of such issue of their respective bodies as aforesaid, doth belong, and without which said H. M. the son, the said C. D. cannot draw into plea the aforesaid tenements, with the appurtenances, nor answer the said A. B. thereof, wherefore he prays aid of the said H. M. the son.

Demurrer  
for plead-  
ing aid-  
prayer, af-  
ter a gen-  
eral impar-  
lance (p).  
[\*1869]

C. D. }  
agst. } And the said A. B. protesting that the said C. lord viscount I.  
A. B. } of the kingdom of Scotland, was not so seised of the tenements  
aforesaid, with the appurtenances, "as the said C. D. hath above supposed  
says, that the matters alleged by the said C. D. in manner and form as the  
same are above stated and set forth, are not sufficient in law for the said  
C. D. to have aid of the said H. M. the son, wherefore he prays judgment,  
and that the said C. D. may answer the said A. B. in the plea aforesaid,  
without the aid of the said H. M. And for causes of demurrer in law,  
the said A. B. set down and shows to the court here, the following, (that  
is to say) for that the said C. D. hath prayed the aid of the said H. M.  
the son, in a term subsequent to that in which the said A. B. counted  
against the said C. D. and after an imparlance had been prayed by and  
granted to him. And also for that the said C. D. hath not made any pro-  
fess of the said several indentures which he hath alleged to have been re-  
spectively made on the — and — days of — in the year of our  
Lord — aforesaid, or of either of such indentures, nor hath he set forth  
any legal excuse for not showing the same or either of them to the court  
here. And for that the said prayer of aid is in various other respects un-  
certain, insufficient, and informal, &c.

Joinder in  
demurrer.

C. D. }  
ats. } And the said C. D. says, that the matters by him alleged, in  
A. B. } manner and form as the same are above stated and set forth, are  
sufficient in law for him the said C. D. to have aid of the said H. M.

(p) See forms, 1 East. Ent. 34, 35. This was decided to be a good cause of demurrer in the case of *Onslow v. Smith*, 2 B. & P. 385, the following opinion was given.—"I wish to exclude the tenant from the aid he has prayed because, if it should be allowed, the demandant will have again to count against the prayer in aid, on his coming in and appearing, and also to give him view if demanded, and then to count a second time after view, as has been

done already with respect to S. the tenant. I understand too that H. M. is a minor, but I do not think the making him a party to the proceedings would suspend them during his minority, as he appears not to take the property in question by descent. I believe the aid prayer is exceptionable on the grounds assigned." In recording the pleadings care must be taken that the imparlances between the count and the aid prayer appear upon the roll.

the son, and this he is ready to verify and prove as the court, &c. And because the said A. B. hath not made any answer to the said aid prayer, nor hitherto denied the same, the said C. D. prays judgment, and also, as before, prays aid of the said H. M. the son, &c.

PROCEED-  
INGS RELA-  
TIVE TO  
WRITS OF  
RIGHT.

William the Fourth, &c. :—Witness A. B. and E. his wife, in our court, before our justices at Westminster, demanded against C. D. widow, [four messuages, four gardens, and four acres of land,] with the appurtenances, in the parish of T. as the right and inheritance of her the said E. by our writ of right, as it is said, and the said C. D. afterwards came into our court, and said that she was seised of the tenements aforesaid, with the appurtenances, in her demesne as of freehold, for the term of her life only, the remainder thereof belonging to H. M. and his heirs forever, and she prayed aid of him the said H. M. which was granted to her; therefore we command you that you summon, by good summoners, the said H. M. that he be before our justices at Westminster, on, ——— (a general return-day,) to answer together with the said C. D. the said A. B. and E. his wife, in the aforesaid plea, if he will, and have you there the summoners and this writ. Witness, &c.

[\*1870]  
Writ after  
prayer in  
aid granted  
to sum-  
mon re-  
mainder-  
man to  
join in the  
defense  
called a  
summons  
ad jungen-  
dum auxil-  
ium (q).

Pledges to prosecute, { John Doe,  
and  
Richard Roe.

Summoners of the within-named are { ———  
and  
—————

By virtue of this writ, directed to me ——— sheriff of the county of ——— I have, on the ——— day of ——— in the year within mentioned, by ——— and ——— good and lawful men of the county within written, summoned the within-named E. F. (*the prayee*), at the lands within specified, that they be before the justices of our lord the king, within written, at Westminster, on the day within contained, to answer the within-named A. B. (*the demandant*), together with the within-named C. D. (*the tenant*), of the within-written plea, if they will, as I am within commanded.

The return  
to the  
above writ  
(r).

——— Sheriff.

Essex, (to wit.)—G. A. (*the prayee*), without whom the said C. D. (*the tenant*), cannot answer A. B. (*the demandant*), of a plea of land, being summoned and not being within the four seas at the time of issuing of the summons, nor at any time within three weeks after, courses himself to be assigned *ultra mare* against the aforesaid A. B. (*the demandant*), of the plea aforesaid.

Entry on  
essoign,  
*de ultra  
mare* (s).

[\*1871]

By ——— (Attorney.)  
——— Date.

In right.

(g) See forms, 2 Saund. 45 d, note 4; and Lee's Dict. Prac. 2d edit.

(r) See Lee's Dict. Prac. 2d edit.  
(s) Id.

PROCEED-  
INGS RELAT-  
IVE TO  
WRITS OF  
RIGHT.

Affidavit  
annexed  
to, and  
filed with  
the above  
essoign (t).

### In Common Pleas.

Between { ——— Demandant,  
and  
——— Tenant.

L. M. (usually the attorney makes this affidavit,) maketh oath and saith, that he, this deponent, is well informed and verily believes that G. H. (the absent prayee,) the prayee in aid named in writ of *summons ad auxiliandum* sued out by the said C. D. (the tenant) in this cause returnable on, &c. is not, nor was within the four seas on the day on which the said writ of summons was executed, and on which he was summoned or at any time within the space of three weeks next ensuing that day, and that the *essoign de ultra mare* cast for him against the demandant in this cause, as this deponent is well informed, and verily believes, is just and true.

Sworn, &c.

L. M.

Appear-  
ance for  
the prayee  
(u).

### In the Common Pleas.

Essex, (to wit.)—Appearance for C. D. (the tenant,) and likewise for G. H. (the prayee,) without whom the said C. D. (the tenant,) cannot answer A. B. (the demandant,) of a plea of land, to answer the said A. B. (the demandant,) of the plea aforesaid.

By ——— (Attorney.)

In right.

—— Date.

Appear-  
ance of the  
tenant, and  
also of the  
prayee,  
and joinder  
in aid of  
the prayee,  
and prayer  
of impar-  
lance (w).

Essex, (to wit.)—Appearance as well for C. D. (the tenant,) as for G. H. (the prayee,) by L. M. his attorney. And the said G. H. (the prayee,) freely joins himself to the said C. D. (the tenant,) in aid against A. B. (the demandant,) of a plea of land, and upon this, as well the aforesaid C. D. (the tenant,) as the aforesaid G. H. (the prayee,) prays leave to imparl thereto here, until ——— in the ——— year of the reign of King George the Fourth, and they have it, &c. the same day is given unto the said A. B. (the demandant,) here.

By L. M. Attorney.

In right.

[\*1872]

### In Common Pleas.

—— Term, — Will. 4.

General  
mise of  
plea, and  
tender of  
demy  
mark (x).

C. D. }  
ats. } And the said C. D. by ——— her attorney, comes and defends  
A. B. } the right of the said A. B. (the demandant) and the seisin of the  
said E. F. when, &c. and the whole, &c. and whatsoever, &c. and other

(t) See Lee's Dict. Prac. 2d edit.

(u) See Lee's Dict. Prac. 2d edit.

(w) See Lee's Dict. Prac. 2d edit.

(x) See other forms of general mise, 3 Wils. 419, 561.—Booth on Real Actions, 95, 6, 8, 102.—Lee's Dict. Prac. 2d edit.—10 Wentw. 215, 220. It is in general advisable for the defendant to plead as in the above, or next form, as it appears to be settled that every thing may be given in evidence upon the mise, joined upon the mere right, except collateral warranty. See 3 Wils. 420.—Bro. Ab. Droit,

48.—Booth, 98, 112, 115.—2 Saund. 45 45 g. The issue joined upon the mere mise to be tried by the grand assize, either at law or at nisi prius, or the assizes, and not by common jury. 1 B. & P. 192.—2 Bla. R. 1261.—1 Taunt. 415.—2 Saund. 45 e, f, notes. It is said to be the safest way, in general to join the mise on the mere right, and give the special matter in evidence, because the defendant may have more latitude in proof of his defense. Booth, 115.—2 Saund. 45 g in notes. At the same time, however it is

ly of the tenements aforesaid, with the appurtenances, as of fee and right &c. and she puts herself upon the grand assize of our lord the king, and prays a recognition to be made, whether she the said C. D. has a greater title to hold the tenements aforesaid, with the appurtenances, \*to her and her heirs, as she now holds the same; or whether the said A. B. the now demandant, has title to hold the same tenements, with the appurtenances, as he has above demanded the same, &c. [And the said A. B. doth the like (y).] And she brings here into the said court the 6s. 8d. for the use of our lord the king, &c. for this, to wit, that it may be inquired of the time, &c. and therefore she prays that it may be inquired by the said grand assize, whether the said E. F. was seised of the tenements aforesaid, with the appurtenances, in his demesne as of fee, in the time of peace, in the time of our lord King George the Third, as the said A. B. the now demandant, has above alleged. [And the said A. B. doth the like (a).]

PROCEED-  
INGS RELA-  
TIVE TO  
WRITS OF  
RIGHT.

[\*1373]

Tender of  
the demy  
mark (z).

### In the Common Pleas.

In right.

— Term, — Will. 4.

C. D. the tenant, }  
ats. } And the said C. D. and E. F. the tenant, and  
A. B. the demandant. } prayee, i. e. the remainder-man \*or reversioner,  
by — their said attorney, come and defend the right of the said A. B.  
(the demandant,) when, &c. And the whole, &c. and whatsoever, &c.  
and mostly of the tenements aforesaid, as of fee and right, &c. And  
they put themselves, upon the grand assize of our lord the king, and they  
pray a recognition to be made, whether the said C. D. (the defendant,)  
has a greater right to hold the tenements aforesaid, with the appurtenances,  
for the term of his life, as tenant thereof, as he now holds the same, the  
remainder thereof to the said E. F. (the prayee, as the limitations may  
be;) or whether the said A. B. (the demandant,) hath title to hold the same  
tenements, with the appurtenances, as they have above demanded the same,  
&c. And they bring here into court 6s. 8d. for the use of our lord the  
king, &c. For this, to wit, that it may be inquired of the time, &c. and

Mise or  
plea by  
tenant and  
prayee, in  
aid and  
tender of  
the demy  
mark, where  
the demandant  
counted upon an-  
cestor's  
seisin (b).

[\*1374]

observed in the same books, that it is frequently the least dilatory and vexatious mode for the defendant, where the matter in bar is clear, to plead it specially, as that the tenant levied a fine with proclamation, or that the ancestor of the demandant made his will and devised away the lands, and where the demandant in his replication to such special plea, would be obliged to admit a part of the demandant's title, which it might be difficult to prove, the defendant may thus obtain an advantage. *Id. ibid.* An issue joined upon a special plea is to be tried by a common jury of twelve men, as other issues are, and not by the grand assize. *Bro. Droit.* 30, 42, 8. — *Booth*, 118, 116. — 3 *Wils.* 420. — 2 *Saund.* 45 g. As to evidence under, see 3 *Wils.* 420. — Who begins, *Holt*, C. N. P. 657. — 3 *Bingh.* 446. (y) The similitur should not be here inserted till the issue. A similitur or replication does not appear to be necessary. *Booth*, 96. When the tender of the demy mark is stated in

the plea, the similitur is usually added at the end of that tender, or is wholly omitted. See *Booth*, 102. — *Co. Ent.* 102. — 3 *Bl. Com.* App. vi.

(z) With respect to the tender of the demy mark in general, see *Booth*, 98. — 2 *Saund.* 45 f, in notes. It is said to be now the practice to tender the demy mark at the time of the trial, and not on joining the mise, as in the above form, and therefore what follows as to the tender of such demy mark may be omitted, *Lee's Dict. Prac.* 2d edit.; and see 3 *Wils.* 561, 562; but see *Booth*, 98, 102. 3 *Bl. Com.* App. ii. — 2 *Saund.* 45 f. As to evidence, see *Holt*, C. N. P. 657. — *Moore*, 672.

(a) This is not to be inserted until the issue made up.

(b) See form, 2 *Saund.* 45 d, n. 4. — *Lee's Dict. Pract.* 2d edit. As to the tender of the demy mark, see the preceding form and notes. See *Holt*, C. N. P. 657.

PROCEED-  
INGS RELAT-  
IVE TO  
WRITS OF  
RIGHT.

therefore they pray that it may be inquired of by the grand assize, whether the said G. H. (*the party on whose seisin the demandant has counted,*) was seised of the tenements aforesaid, with the appurtenances, in his demesne as of fee, in the time of peace, in the time of our lord the King George the Third, as the said A. B. the now demandant, hath above alleged. And the said A. B. doth the like. Therefore, &c. (c).

Denial of  
ancestors'  
seisin (d).

Draper }  
ats. }

And the said C. D. by — his attorney, comes and defends the right of the aforesaid A. B. and his seisin, &c. and says that the said E. F. the late father of the said A. B. was not seised of the tenements aforesaid, with the appurtenances, or of any part thereof, in his demesne as of fee and right, in manner and form as the said A. B. hath above alleged, and of this the said C. D. puts himself upon the country, &c. and for a further plea in this behalf, by leave of the court here, for this purpose first had and obtained, according to the form of the statute in such case made and provided, the said C. D. says, that the said A. B. ought not to have his seisin of the tenements aforesaid, with the appurtenances, in the said declaration mentioned, or of any part thereof, because he says, that upon the death of the said G. H. the right descended to J. K. as son and heir of the said G. H.; by virtue thereof, the said J. K. afterwards, to wit, on the — day of — in the year of our Lord — entered into the said tenements, with the appurtenances, and was seised, by taking the esplees thereof to the value, &c. And the said J. K. being so seised thereof, he the said J. K. afterwards, to wit, on the day and year last aforesaid, at — in the said county, enfeofed the said C. D. of the said tenements, with the appurtenances to have and to hold the same unto the said C. D. and his heirs, by virtue of which said feoffment the said G. D. became and was seised of the said tenements, with the appurtenances, in his demesne as of fee and right; without this, that upon the death of the said G. H. the right descended to the said A. B. in manner and form as the said A. B. hath above alleged; and this the said C. D. is ready to verify. Wherefore he prays judgment if the said A. B. ought to have his seisin of the said tenements, with the appurtenances, in the said declaration mentioned, or of any part thereof.

2d. Denial  
of descent  
to the de-  
mandant  
(e).

[\*1875]

*In the Common Pleas. Easter term, in the 12th year of the reign of King George the Third.*

Rule of  
court by  
consent  
for strik-  
ing out  
special  
pleas, and  
pleading  
only the  
general  
issue on  
terms (f).

Tessen, Esq. }  
ats. }  
Clark. }

Thursday, the 13th of May, upon reading a rule made between the said parties, on the 9th of February, in Hilary Term last, and upon hearing counsel on both sides, and the demandant by his

(c) Award of summons, &c. see Holt, C.N. P. 668.

(d) See forms, 10 Wentw. 220. A special plea seems unnecessary. See ante, 1872, note

(x). When a special plea is advisable see Booth on Real Actions, 115 Ante, 1872,

n. (x).

(e) See forms, of other pleas, 10 Wentw. 215.—1 H. Bla. 1.

(f) See form, 8 Wils. Rep. 563; and law, 420.



counsel hereby consenting, that the tenant upon the trial of this cause shall give in evidence that a fine was levied in Michaelmas Term, in the 16th year of the reign of his late Majesty King George the Second, between John Clarke, the late father of the said tenant in this cause, as plaintiff, and Roger Osbaldeston, and Sarah his wife, deforceants, of tenements in the demandant's declaration mentioned; and that the same was engrossed, and afterwards publicly and openly read and proclaimed according to the form of the Statute, &c. and that such fine was levied to the use of the said John Clarke, and his heirs; and by virtue thereof, the said John Clarke entered into the said tenements, with the appurtenances, and thereby became seised thereof in his demesne as of fee, and that he died seised afterwards, and that the said George Clarke, the tenant, was his heir; and neither did Francis Tyssen, the father, nor Francis John Tyssen, the son, at any time within five years next after the proclamation had and made, pursue his title, claim, or interest in or to the said tenements, or any part thereof, by way of action or lawful entry, and the tenant, by his counsel, hereby consenting that the demandant on the said trial shall be at liberty to give in evidence that they who were the parties to the said fine, or any of them, at the time of levying of the said fine, had nothing in the premises; it is ordered, that the second plea pleaded in this cause be struck out.

PROCEED-  
INGS REL-  
ATIVE TO  
WRITS OF  
RIGHT.

[\*1876]

By the court.

On the motion of Serjeant Walker, for the tenant; Serjeant Basland, for the demandant.

FOTHERGILL.

*Dorsetshire* (to wit.) Writ of summons for Harry Galton, demandant, against Wm. Harvey, tenant. Return, &c. *Præcipe for writ of summons.*

William, &c. to the sheriff of — greeting:—We command you, that by good summoners you summon four lawful knights of your county, girt with swords, that they be before our justices at Westminster, on — (a general return day) [if at the assizes, then, after inserting the return, say, "or before our justices assigned to take the assize in and for your county, if they shall first come, on Monday, the first day of July next, the day of the assizes, at Abingdon, in your county, according to the form of the Statute in such case made and provided,"] to make election of our grand assize, between A. B. demandant, and C. D. tenant of, &c. [premise as in the writ of right,] in your county, whereof the said C. D. (the tenant) in our same court, hath put himself upon our grand assize, by praying a recognition to be made, whether he hath a greater title to hold the tenements aforesaid, with the appurtenances, to him and his heirs, as tenants thereof, as he now holds the same, or whether the said A. B. (the demandant) hath title to hold the same tenements, with the appurtenances, as he has demanded the same, and have you there the names of the summoners, the knights, and this writ. *Writ of summons to the knights to elect the grand assize into bank, or at the assizes (s).*

(s) See form, Lee's Dict. Prac. 2d ed. 2 Saund. 46 c, in notes. As to the necessity for this form, see 1 Taunt. 415.—2 Saund. 42 c.—2 Bla. Rep. 1261.—2 C. & P. 187.—1 M. & P.

2. The form in 2 Bla. Rep. 1268, is defective. See a form of summons, when the cause is to be tried in Middlesex, 3 Wils. 569.

PROCEED-  
INGS RELAT-  
IVE TO  
WRITS OF  
RIGHT.

Witness, Sir N. O. T. knight, at Westminster, the — day of — in the — year of our reign.

Signed —

[\*1877]

The like writ of summons to the sheriff in another form, to summon four knights to elect the grand assize or jury (h).

\*William the Fourth, &c. to the sheriff of Dorsetshire, greeting :—We command you, that by good summoners you summon four lawful knights of your county, girt with swords, that they be before — and — our justices assigned to hold the assizes for our said county of Dorset, at Dorsetshire, in the said county, on — the — day of — next, to make election, on their oath, of our grand assize between H. G. demandant, and W. H. tenant of, &c. in the parish, &c. in your county, whereof the said W. in our same court hath put himself upon our grand assize, by praying a recognition to be made, whether he hath a greater title to hold the tenements aforesaid, with the appurtenances, unto him and his heirs as tenants thereof, as he now holds the same ; or whether the said H. hath title to hold the same tenements, with the appurtenances, as he hath demanded the same. And that you return to our justices of the Bench at Westminster, in fifteen days of Easter, the names as well of the said knights, so by you to be summoned, as by the persons who shall be by them elected, according to the exigency of this writ, together with this writ.

Witness, Sir N. C. T., &c.

Return to such writ (i).

By virtue of this writ to me directed, I have caused L. M., &c. [*the names of the knights,*] four lawful knights of my county, to be summoned by O. P. and Q. R. my bailiffs, to be before his majesty's justices, at the day and place within mentioned (k), to do as by this writ they are required ; and as I am within commanded. The summoners are, and each of them is, mainprised by John Doe and Richard Roe.

The answer of E. F. sheriff.

The alias writ of summons of four knights (l)

William the Fourth, &c. to the sheriff of — greeting :—We command you, as before we have commanded you, that by good summoners you summon four lawful knights, &c. [*as in the first writ of summons, verbatim.*]

[\*1878]

\*Witness, Sir N. O. T. knight, at Westminster, the — day of — in the — year of our reign.

The return of the alias writ of summons of four knights (m).

By virtue of this writ to me directed, I have caused J. E., J. H., P. D. and G. M. four lawful knights of my county, girt with swords, to be summoned by H. J. and J. W. my bailiffs, to be before his majesty's

(h) See *Luke v. Harris*, 2 Bla. Rep. 1298, and 1261. This form was settled by two very eminent Pleaders, with reference probably to 2 Bla. Rep. 1261. But it should seem that the supposed knights should be summoned in the alternative, as in the preceding form.

(i) *Quære* if the return should not be that the sheriff hath summoned them in the alternative, 2 Saund. 45 e, in note.

(k) *Lee's Dict. Prac.* 2d edit.—2 Saund. 45 e.

(l) See 2 Wils. 560. The sheriff having done nothing upon the writ of summons of

four knights, the above alias writ of summons issued returnable from the day of Saint Martin in fifteen days.

(m) See 3 Wils. 560. The four knights above mentioned appeared in court at the return of the alias writ of summons, and being placed in the jury-box on the north side of the court of the Bench, were severally sworn lawfully and truly to choose twelve knights, girt with swords, of themselves and others, which best know and will declare or say the truth between the parties.

**PROCEED-  
INGS RELA-  
TIVE TO  
WRITS OF  
RIGHT.**

The answer of { S. S. Esq. }  
                                    and  
                                    { W. L. Esq. } Sheriffs.

**Writ of  
venire fa-  
cias (n).**

**The writ of  
*Habeas cor-  
pora recog-  
nitorum*  
(o).**

(o) This writ should be tested on the *quarto die post* of the return of the *venire*. The draft was settled by two very eminent Pleaders at the bar. See the requisites, 2 Saund. 45 c.—2 Bla. Rep. 1268, 1298.—1 Taunt. 415.

PROCEED-  
INGS  
RELATIVE  
TO WRITS  
OF RIGHT.

*Pleas at Westminster before Sir N. C. Tindal, knight, and his companions, justices of our lord the king of the bench, of Trinity Term; in the 1st year of the reign of our sovereign lord William the Fourth, by the grace of God, &c.*

Record of  
Nisi Prius  
(p).

Award of  
summons  
of four  
knights.

[\*1380]

Continu-  
ance by  
vice comes  
non misit  
breve.

Alias sum-  
mons  
awarded.

Further  
continu-  
ance by  
vice comes  
non misit  
breve.  
Pluries  
summons  
awarded.

Return to  
the writ of  
summons  
that there  
are no  
knights in  
the county,  
and that  
the sheriff  
has sum-  
moned  
four others.

[\*1381]

Appear-  
ance of  
other four  
persons.

*Dorsetshire (to wit), [to the end of the issue, and then proceed as follows:]* Therefore the sheriff is commanded \*that he summon, by good summoners, four lawful knights of his county, girt with swords, that they be here, on the morrow of All Souls, to make election, on their oath, of the grand assize aforesaid, &c. the same day is given to the parties aforesaid, here, &c. At which day comes here as well the said H. as the said W. by their attornies aforesaid, and the sheriff has not sent the writ of our lord the king to him in that behalf directed, nor hath he done any thing thereupon. Therefore, as before, the sheriff is commanded that he summon by good summoners, four lawful knights of this county, girt with swords, that they be here, in eight days of St. Hilary, to make election, on their oaths, of the grand assize aforesaid, &c. the same day is given to the parties aforesaid, here. At which day came here as well the said H. as the said W. by their attornies, aforesaid, and the sheriff hath not sent the writ of our said lord the king to him in that behalf directed, nor hath he done any thing thereupon. Therefore the sheriff is commanded, that he summon by good summoners, four lawful knights of this county, girt with swords, that they be before — and — his said Majesty's justices, assigned to hold the assize for the said county, at Dorchester, in the said county, on, — the — day of — next, to make election, on their oaths, of the grand assize aforesaid, and that he return to his said Majesty's justices of the Bench here, in fifteen days from the day of Easter, the names as well of the said knights, so by him to be summoned, as of the persons who shall be by them elected, according to the exigency of the writ of our said lord the king to him in that behalf directed, together with that writ, the same day is given to the parties aforesaid, here, &c. At which day, to wit, in fifteen days from the day of Easter aforesaid, come here as well the said H. as the said W. by their attornies aforesaid, and the sheriff, to wit, E. B. P. esq. sheriff of Dorsetshire aforesaid, now here returns, that by virtue of the writ to him directed, because there were no knights in his bailiwick, he had caused the honorable C. A., Sir W. O. bart. W. B. P. esq. and W. T. esq. four good and lawful men of his county, girt with swords, to be summoned by R. R. and W. S. good summoners, that they be before his majesty's justices, assigned to hold the assizes aforesaid, at the time and place in the said writ in that behalf mentioned, and then and there to do as by the said writ they are required, and that the said summoners are, and each of them is, mainprized by John Doe and Richard Roe. Whereupon the said C. A., \*Sir W. O. bart., W. B. P. and W. T. being called, girt with swords, before the said justices assigned to hold the assizes aforesaid, at the time and place last aforesaid, and being sworn, upon their oaths, in the presence of the parties, did choose of themselves and others, twenty-four, to wit, C. A., W. O., W. B. P., W. T., &c. good and lawful men of the county aforesaid, who are neither of them akin to the said H. nor to the said W. to make recognition of the

(p) This record was settled by two very eminent pleaders at the bar.

grand assize aforesaid. Therefore the sheriff is commanded that he cause them to come here in three weeks of the Holy Trinity, to make the recognition aforesaid, &c.

PROCEEDINGS RELATIVE TO WRITS OF RIGHT.

*Pleas, &c.*

[Leave blank in the record for a second placita, when necessary, the same as in personal actions.] Dorsetshire (to wit).—The recognition of the grand assize between H. G. demandant, and W. H. tenant of, &c. [here set out the premises] in the parish, &c. in the county, &c. whereof, &c. is respited here until—[a general return day], unless his majesty's justices assigned to take the assizes in and for the said county of Dorset, shall first come on—the—day of—at Dorchester, in the said county, for default of the recognitors chosen to make the recognition aforesaid, because none of them did appear; therefore let the sheriff have the bodies of the said recognitors whose names are mentioned in the panel annexed to the writ of *habeas corpora recognitorum*, and be it known that the justices here in court, in this same Term, delivered a writ thereupon to the deputy sheriff of the county aforesaid, to be executed in due form of law, &c.

The sheriff commanded to have the grand assize in bank in Trinity Term.

Respites, &c.

"I X. Y. do swear, that I will say the truth whether C. D. [the tenant,] hath more right to hold the tenements which A. B. [the demandant,] demands against him by this writ of right, or the said A. B. [the demandant,] to have them as he demandeth; and for nothing to let to say the truth.

Form of the oath on the grand assize (q).

"So help me God."

[State the count, and the general mise, and tender of demy-mark, as ante, 1372, and then proceed as follows:—]—\*And the said J. doth the like, therefore as well (s) to try this mise as the other mise between the parties aforesaid above joined, the sheriff is commanded that he summon, by good summoners, four lawful knights of this county, girt with swords, that they be here, on the Octave of the Purification of the blessed Virgin Mary next coming, to make election of the assize aforesaid, the same day is given to the parties aforesaid here, to hear election of the assize aforesaid, &c. At which day come here as well the said J. L. as the said H. H. by their attorney aforesaid, and the said sheriff hath not sent the writ; therefore the sheriff is commanded that he summon, by good summoners, four lawful knights, or other good and lawful men of his county, girt with swords, that they be here in fifteen days from Easter, unless the justice of our lord the king should be at the castle of Exeter, in the said county, to hold the assize on—the—day of—at the castle of Exeter, in the county of Devon, to be sworn to make election of the grand assize of our said lord the now king, between the parties aforesaid; the same day is given to the parties aforesaid, to hear the election of the assize

Entry of proceedings on Plea Roll (r).

["1382]

Summons of the knights awarded.

Nisi Prius awarded.

(q) See form, 8 Wils. 541.—Lee's Dict. Prac. 2d edit.—2 Saund. 45 f, in note.—Co. Litt. s. 511.

(r) See other fuller forms, Booth on Real Actions, 102.—Rast. Ent. 108.—3 Bla. Com. App. vi.

(s) If the two *similiters* are inserted in the

general mise, as ante, 1373, this statement of two issues may be proper; but if only one *similiter* was inserted, then the form should run, "Therefore the sheriff is commanded that he summon, &c." Booth on Real Actions, 102.—Co. Ent. 181.—2 Bla. Com. Appendix.

PROCEED-  
INGS RELAT-  
IVE TO  
WRITS OF  
RIGHT.

Return by  
sheriff that  
there were  
no knights  
in his  
county,  
and that he  
had sum-  
moned four  
other per-  
sons (t).  
Appear-  
ance of the  
four per-  
sons so  
summoned.

[\*1383]

Award of  
alias sum-  
mons of  
four  
knights.

*Vice comes  
non misit  
breve.*

Award of  
second  
alias sum-  
mons of  
four  
knights.

*Vice comes  
non misit  
breve.*

Award of  
another  
alias sum-  
mons of  
four  
knights.

*Vice comes  
non misit  
breve.*

Award of  
another  
alias sum-  
mons of  
four  
knights, or  
four lawful  
men.

Sheriff's  
return that  
there were  
no knights,  
but he had

aforesaid, &c. At which day came here as well the said J. L. as the said H. H. by their attornies aforesaid, and the sheriff, to wit, H. H. esq. at that day returned to the justices of our said lord the now king, that there were no knights in his county that he could summon, as he was by the said writ commanded; and therefore, by virtue of the said writ, he had caused, &c. [name them] four lawful men of his county, girt with swords, to be summoned by W. S. and J. R. his bailiffs, to be before his Majesty's justices of assize, at, &c. in, &c. aforesaid, on, &c. to do as by the above writ he was required and commanded, and that the summoners are, and each of them was mainprized by John Doe and Richard Roe, whereupon the said, &c. four lawful men of the county aforesaid, being called, in their proper persons, came before the justices of our lord the king, on, &c. at, &c. in, &c. aforesaid, "but then and there were not sworn according to the said writ. Therefore, as before, the sheriff is commanded that he summon, by good summoners, four lawful knights of his county, girt with swords, that they be here, on the morrow of the Ascension of our Lord next coming, to make election of the assize aforesaid, the same day is given to the parties aforesaid, to hear the election of the assize aforesaid, &c. At which day come here as well the said J. L. and the said H. H. by their attornies aforesaid, and the sheriff hath not sent the writ. Therefore, as before, the sheriff is commanded, that he summon, by good summoners, four, &c. girt, &c. and that they be here, on the morrow of the Holy Trinity next coming, to make election of the assize aforesaid, the same day is given to the parties aforesaid here, to hear the election of the assize aforesaid, &c. At which day come here as well the said J. L. as the said H. H. by their attorney aforesaid, and the sheriff hath not sent the writ. Therefore, as before, the sheriff is likewise commanded that he summon, by good summoners, four, &c. girt, and that they be here in three weeks of the Holy Trinity next coming, to make election of the assize aforesaid, the same day is given, &c. to hear, &c. At which day come here as well the said J. L. as the said H. H. by their attorney aforesaid, and the said sheriff hath not sent the writ. Therefore, as before, the sheriff is commanded, that he summon by good summoners, four, &c. or other good and lawful men of the county, girt with swords, that they be here on the morrow of All Souls, unless the justices of our lord the king should be at the castle of Exeter in the said county, to hold the assize, on — the — day of — to be sworn to make election of the grand assize of our lord the now king, between the parties aforesaid, the same day, &c. to hear, &c. At which day came here as well the said J. L. as H. H. by their attornies aforesaid, and the sheriff, namely, H. H. at that day returned to the justices of our said lord the king, that there were no knights in his said county that he could summon, as by the said writ he was commanded; and therefore, by virtue of the said writ, &c. he had caused, &c. four lawful men of his county, girt, &c. to be summoned by W. S. and — his bailiff, to be before his majesty's justices of assize, at, &c. in, &c. on, &c. to do as by the said writ was required and com-  
manded, and that the summoners, and each of them, was mainprized by, &c. Whereupon the said, &c. four, &c. of the county aforesaid, "being

[\*1384]

(t) See Booth on Real Actions, 96.

called, in their proper persons came before the justices of our lord the king, on the — day of — aforesaid, at, &c. in, &c. aforesaid, girt, &c. and were sworn lawfully and truly to choose twelve knights, or other good and lawful men, girt, &c. who best know and will say the truth between the parties, and were not of kin to either. And afterwards, to wit, on the — day of — in the — year of the reign of our said lord the king, at, &c. aforesaid, the said, &c. came in their proper persons, and being sworn as aforesaid in the presence of the parties aforesaid, chose of themselves, and other knights, to wit, &c. good and lawful men of the county aforesaid, who neither are of kin to the said J. L. nor to the said H. H. to make recognition of the grand assize aforesaid.—[Then follows award of venire facias, &c. see 3 Bla. Com. App. vi. Booth on Real Actions, 103.]

PROCEED-  
INGS RELA-  
TIVE TO  
WRITS OF  
RIGHT.

summoned four other lawful persons. Swearing of the four knights. Election of the recognitors.

At which day, before our lord the king at Westminster, come as well the said A. B. and E. F. as the said C. D. by their said attornies; and the said H. M. [*the prayee in aid*] though summoned as before, and solemnly called, came not; therefore it is considered that the said C. D. answer the said A. B. and E. the said count, without the said H. M.

Judgment when the prayee in aid makes default upon the return of the *alias summonens* a / *iudgmentum auxilium* (u). Judgment after mise joined (w).

Therefore it is considered, that the said A. B. and E. his wife, take nothing by their said writ, but be in mercy for their false claim thereof; and that the said C. D. widow, go thereof without day, &c. and that she the said C. D. holds the tenements aforesaid, with the appurtenances, to her and her heirs quit of the said A. B. and E. his wife, and the heirs of the said E. forever.

Therefore it is considered that the said A. B. (*the demandant*) recover his seisin against the said C. D. (*the tenant*) of the tenements aforesaid, with the appurtenances, to hold to him and his heirs, quit of the said C. D. (*the tenant*) and his heirs forever. And the said C. D. (*the tenant*) in mercy, &c.

Judgment for the demandant (x).

Therefore it is considered that the said A. B. (*the demandant*) take nothing by his said writ, but be in mercy for his false claim thereof; and that the said C. D. (*the tenant*) go thereof without day, &c. and that he the said C. D. (*the tenant*) hold the tenements aforesaid, with the appurtenances, to him and his heirs quit of the said A. B. (*the demandant*) and his heirs forever.

[\*1385] Judgment for the tenant (y).

Amongst the pleas of land of — Term, in the 13th year of King George the Third. Roll, 432.

Middlesex, (to wit.)—Francis John Tyssen, by — his attorney, demands against George Clarke, ten messuages, ten gardens, &c. [*describe the premises*] with the appurtenances, in the parish of St. John, Hackney, as his right and inheritance, by writ of the lord the king, of right, and thereupon he saith, that F. T. esq. father of him the said F. J. T. was

Record of final judgment and count upon a writ of right on seisin of demandant's father (z).

(\*) See form, 3 Saund. 45 d, note 4.

(x) 2 Saund. 45 f.

(w) See form, Lee's Dict. Prac. 2d ed. 3 Wils. 68.

(y) See Lee's Dict. Prac. 2d edit.

(z) See form, 2 Wils. 561.

PROCEED-  
INGS RELA-  
TIVE TO  
WRITS OF  
RIGHT.

The de-  
fense and  
general  
mise (a).

Issue  
joined.

Award of  
summons  
of four  
knights to  
elect the  
grand as-  
size.

[\*1886]  
Continu-  
ance by  
*vice comes  
non misit  
breve.*

*Alias* sum-  
mons of  
the four  
knights.  
Return  
thereto.

The four  
knights  
appear  
and elect  
the grand  
assize.

Award of  
*venire fa-  
cias.*

Recogni-  
tors of as-  
size come.

seised of the tenements aforesaid, with the appurtenances, in his demesne as of fee and right, in the time of peace, in the time of the lord George the First, late King of Great Britain, (to wit) within sixty years now last past, by taking the esplees thereof, to the value, &c. and from the said F. the father, the right descended to the said F. J. T. who now demands, as son and heir of the said F. his father, and that such is his right he offers, &c. And the said C. D. by — his attorney, comes and defends the right of the said F. J. T. and the seisin of the said F. J. T. when, &c. and the whole, &c. and whatsoever, &c. and mostly of the tenements aforesaid, as of fee and right, and he puts himself on the grand assize of our lord the king, and he prays a recognition to be made whether he the said C. D. has a greater title to hold the tenements aforesaid, with the appurtenances, to him and his heirs, as tenants thereof, as he now holds the same, or whether the said F. J. T. has title to hold the same tenements, with the appurtenances, as he has above demanded the same, &c. and that the said F. J. T. doth the like; therefore the said sheriff is commanded that he summon, by good summoners, four lawful knights of this county, girt with swords, that "they be here on the morrow of All Souls next coming, to make election of the assize aforesaid; the same day is given to the parties aforesaid here, to hear the election of the assize aforesaid here, &c. At which day here come, as well the said F. J. T. as the said C. D. by their attornies aforesaid, and the sheriff hath not sent the writ; therefore, as before, the sheriff is commanded that he sammon, by good sammoners, four lawful knights of his county, girt with swords, that they be here, from the day of St. Martin in fifteen days next coming, to make election of the assize aforesaid, the same day is given to the parties aforesaid here, to hear the election of the assize as aforesaid, &c. At which day come here, as well the said F. J. T. as the said C. D. by their attornies aforesaid, and the sheriff, (to wit) S. S. esq. and W. L. esq. now returns, that he had caused to be summoned J. E., J. H., P. D., and G. M., four lawful knights of his county, girt with swords, by H. F. and J. W. his bailiffs, to be here from the day of St. Martin, in fifteen days aforesaid, to do as the same writ commands and requires; and that the said summoners are, and each of them is, mainprised by John Doe and Richard Roe. Whereupon the said J. E., J. H., P. D., and G. M., four lawful knights of the county aforesaid, girt with swords, being called, in their proper persons come, and being sworn upon their oath, in the presence of the parties aforesaid, chose of themselves and others, twenty-four (to wit) J. E., J. H., P. D., J. M., J. W., J. K., &c. esqrs. good and lawful men of the county aforesaid, who neither are of kin to the said F. J. T. nor to the said C. D. to make recognition to the grand assize aforesaid. Therefore the sheriff is commanded that he cause them to come here on the octave of St Hilary, to make the recognition aforesaid, the same day is given to the parties here, &c. At which day here come, as well the said F. J. T. as the said C. D. by their attornies aforesaid, and the sheriff hath not sent the writ; therefore, as before, the sheriff is commanded that he cause to come here from the day of Easter in one month, to make the recognition aforesaid, the same day is given to the parties aforesaid here, &c. At which day here come, as well the said F. J. T. as the said C. D. by their attornies aforesaid, and the recognitors of the assize, whereof



mention is above made, being called, come, and certain of them, (to wit,) J. E., J. H., P. D., C. M. &c. esquires, being elected, tried, and sworn upon their oath, say, that the said F. J. T. hath greater title to hold the said tenements, with the appurtenances, "to him and his heirs, as he above demandeth the same, than the said C. D. to hold the same, as he now holdeth them, as the said F. J. T. by his aforesaid writ hath supposed. Therefore it is considered, that the said F. J. T. recover his seisin against the said B. D. of the tenements aforesaid, with the appurtenances, to hold to him and his heirs quit of the said C. D. and his heirs forever, and the said C. D. in mercy, &c.

PROCEEDINGS RELATIVE TO WRITS OF RIGHT.

Postea for demandant.

[\*1887]

Final judgment. Mercy.

## \*PROCEEDINGS IN PARTITION.

[\*1890]

William the Fourth, by the grace of God, of the United Kingdom of Great Britain and Ireland, king, defender of the Faith, and so forth, to the sheriff of — greeting:—If A. B. and C. D. shall give you security that their suit shall be prosecuted, then summon by good summoners, E. F. that he be before our justices at Westminster, on — (*a general return day*), to show wherefore whereas the said A. B., C. D. and E. F. hold together and undivided the manor of —, with the appurtenances and, [14 messuages, 12 cottages, 16 barns, 8 dove-houses, 4 stables, 13 gar dens, 200 acres of land, 200 acres of meadow, 200 acres of pasture, 200 acres of wood, 100 acres of furze and heath, 200 acres of moor, 100 acres of bushy ground, 100 acres of marsh, 100 acres of broom, 20 acres of land covered with water,] £20 rent common pasture for all manner of cattle, court leet, court baron, view of frank pledge, profits, and perquisites of court, free-warrant, free-chase, free-fishery, goods and chattels of felons, fugitives, out-laws, and those which are put in exigent, deodands, chattels, waived and estrayed, with the appurtenances, in the parishes of — and —, of which the said E. F. denieth partition to be made between them, according to the form of the Statute (*b*) made and provided, [or if *parceners by custom* say, "according to the custom of England,"] and unjustly permitteth the same not to be done, and contrary to the form of the said Statute, as they say, and have you there the summoners and this writ. Witness ourself at Westminster, the — day of — in the — year of our reign.

Original writ in partition, on 8 & 9 W. 8, c. 81 (a).

\*Between { A. B. and C. D. . . . Demandants,  
and  
E. F. . . . Tenant.

[\*1891]

J. M. of —, and O. P. of —, officers to the sheriffs of —, sev-

Affidavit of service of writ of

(a) 2 Sell. Prac. 1st edit. 810; 2d edit. 215. 10 Wentw. 161. As to "the proceedings in general, see Bac. Ab. Joint-tenants, 1. 7.—Com. Dig. Pleader, 3 F. Chancery, 4 E. Parcener, C.—2 Bla. Rep. 1184.—2 Cruise's Dig.

528, &c.—2 Sell. Prac. 1st ed. 807; 2d edit. 212. It seems in general more advisable to proceed in equity, 2 Cruise's Dig. 531.—Co. Litt. 169 a, note 7.—6 Ves. 498. (b) See 8 & 9 W. 8, c. 81.

PROCEEDINGS IN PARTITION.

partition, on 8 & 9 W. 3, c. 81, s. 1 (c).

erally make oath and say, that they the said deponents did, on the — day of —, in the year of our Lord —, serve the above-named E. F. tenant with the writ, of partition in this cause, by delivering to and leaving with the said E. F. a copy of the said writ, and acquainting him with the contents thereof; and these deponents did, on the said — day of —, in the said year of our Lord —, deliver to and leave with P., Q., R., S., T., V., &c. the occupiers of the messuages, lands, and tenements, in the said writ mentioned, a true copy of the same writ. Sworn, &c.

Writ of pone upon default of appearance (d).

William the Fourth, &c. to the sheriff of —, greeting: Put by sureties and safe pledges E. F. of —, that he be before the justices at Westminster, on — (*a general return day*) to answer A. B. and C. D. wherefore the said A. B., C. D., and E. F., hold together and undivided the manor of —, with the appurtenances, &c. [*as in the writ*] of which the said E. F. denieth partition to be made between them according to the form of the Statute in such case made and provided, and unjustly permitteth not the same to be done, and to show wherefore he was not in our court, before our justices at Westminster, on — (*a general return day*) last past, as he was summoned, and have there the names of the pledges and this writ. Witness, &c.

*In the Common Pleas.*

— Term, — Will. 4.

Declaration in partition by tenant in common, 8 & 9 W. 3, c. 8. (e). [*\*1892*]

—, (to wit,)—E. F. of —, in the county aforesaid, was summoned to answer A. B. and C. D. of a plea, wherefore \*whereas the said A. B., C. D. and the said E. F., hold together and undivided the manor of —, with the appurtenances, &c. [*specifying the premises according to the writ*] of which the said E. F. denieth partition to be made between them according to the form of the Statute in such case made and provided, and unjustly permitteth not the same to be done, and contrary to the form of the Statute. And whereupon the said A. B. and C. D. — by their attorney, say, that whereas they and the said E. F. hold together and undivided the tenements aforesaid, with the appurtenances, whereof it belongs to the said A. B. and C. D. and their heirs, to have one moiety of the tenements aforesaid, with the appurtenances, to hold them in severalty, so that the said A. B. and C. D. of the moiety belonging to them of the tenements aforesaid, with the appurtenances, and the said E. F. of his moiety belonging to him of the tenements aforesaid, with the appurtenances, may severally apportion themselves, be the said E. F. denieth partition thereof to be made between them, according to the form of the statute in such case made and provided, and unjustly permitteth not the same to be done, and contrary to the form of the said Statute; whereupon they say that they are injur-

(c) See forms and proceedings, 2 Sell. Prac. 1st edit. 811; 2d edit. 216; and see ante, 1890, note (a).

(d) See forms, 2 Sell. Prac. 1st edit. 812; 2d edit. 216; and ante, 1890, note (a).

(e) As to the form and requisites of declaration, see 2 Sell. Prac. 1st ed. 813; 2d ed. 217. —10 Wentw. 151.—Pl. A. 804.—8 B. & P.

378.—Com. Dig. Plead. 3 F. When, as in the above form the declaration is by tenants in common, the title need not be shown; but in partition by parceners or joint-tenants, it must be shown in the declaration how they became so, Cro. Eliz. 64.—2 Sell. Prac. 1st edit. 813.

ed, and have damage to the value of £—, and thereof they bring suit, PROCEED-  
INGS IN  
PARTITION.  
&c.

[*Copy the declaration to the end, and proceed as follows:*—And the said T. S. and E. his wife, by J. F. their attorney, and the said W. B., B. B. the younger, T. B., A. R., and D., by O. P. who is admitted by the court of our lord the king now here to prosecute and defend for the said W. B., B. B. the younger, T. B., A. R., and D. who are respectively infants within the age of twenty-one years as the guardian of the said W. B., B. B., the younger, T. B., A. R., and D. come and defend the force and injury when, &c. and say that they cannot deny the aforesaid action of the said B. B. the elder, and S., not but that partition ought to be made between them and the said B. B. the elder, and S. of the tenements aforesaid, with the appurtenances in form aforesaid, and they freely consent that partition thereof may be made between them, &c.; therefore it is considered that partition be thereof made between the said B. B. the elder and S. and the said W. B., B. B. the younger, T. B., T. S., and E. his wife, A. R., and D. of the tenements aforesaid, with the appurtenances; and it is commanded to the sheriff that in his proper person he go to the tenements aforesaid, with the appurtenances, and there, in the presence of the parties aforesaid, by him to be forewarned, if they shall be willing to be present, the tenements aforesaid, with the appurtenances, by the oath of good and lawful men of his county, respect being had to the true value of the said tenements, with the appurtenances, he cause to be divided into two equal moieties, and one moiety thereof he cause to be delivered and assigned to the said B. B. the elder, and S. and the other moiety thereof to the said W. B., B. B. the younger, T. B., T. S., and E. his wife, A. R., and D. to be holden in severalty so that neither the said B. B. the elder, and S. nor the said W. B., B. B. the younger, T. B., T. S., and E. his wife, A. R., and D. may have more than respectively belongs to them of the tenements aforesaid, with the appurtenances; and that the said B. B. the elder, and S. of their moiety belonging to them of the tenements aforesaid, with the appurtenances and the said W. B., B. B. the younger, T. B., T. S., and E. his wife, A. R. and D. of their moiety belonging to them of the said tenements, with the appurtenances, may severally approve themselves; and that partition by the said sheriff so distinctly and openly made, he have under his seal and the seals of those by whose oath he shall have made the same partition, together with the writ of our said lord the king to him thereupon directed, the same day is given to the parties aforesaid here, &c.

Plea by  
confession  
of infants  
by guardian (f).

Judgment.  
[\*1893]

“Therefore it is considered, that partition be made thereof between them, &c. And it is commanded to the sheriff, that in his proper person he go to the manor and tenements aforesaid, and in the presence of the parties aforesaid, being forewarned, if they shall be willing, the manor and tenements aforesaid, with the appurtenances, by the oath of (h) good and lawful men of his county, respect being had to the true value of the manors and tenements aforesaid, with the appurtenances, he cause to be divided

Form of  
the first  
judgment  
in partition (g).

(f) The tenants having appeared, must 1892, and 10 Wentw. 152.  
confess the action.

(g) See 2 Sell. Prac. 1st edit. 815, 2d ed. 529.—Booth on Real Actions, 244.  
219. The like confession, see form, ante,

(h) Quare, “twelve” good, &c. 2 Cruise,

PROCEED-  
INGS IN  
PARTITION.

into two equal parts, (or, *as the case is*) and one part of those parts "be cause to be delivered and assigned to the said A. B. and C. D. and the other part thereof to the said E. F. to be holden to them and their heirs in severalty, so that neither the said A. B. and C. D. nor the said E. F. may have more of the manor and tenements aforesaid, with the appurtenances, than it belongeth to them to have; and that the said A. B. and C. D. of their part to them thereof belonging, and the said E. F. of his part to him thereof belonging, may severally apportion themselves; and that that partition, by the said sheriff so distinctly and openly made, be have here from the day of Easter in fifteen days, under his seal, and the seals of those," &c.

Form of  
the writ  
*de parti-  
tione faci-  
enda* (i).

William the Fourth, by the grace of God, of Great Britain and Ireland, king, defender of the Faith, and so forth. To the sheriff of — greeting — Whereas E. F. late of — in your county, esquire, was summoned to be in our court, before our justices at Westminster, to answer A. B. and C. D. of a plea whereof the said A. B. and C. D. and the said E. F. hold together and undivided the manor of — with the appurtenances, [*specify the premises according to the declaration*] and the said E. F. denied partition thereof to be made between them, according to the form of the Statute in such case made and provided, and unjustly permitted not the same to be done, and contrary to the form of the Statute, as they said; and the said E. F. appearing in our said court, freely consented that partition thereof might be made (k). Whereupon it was considered in our said court, before our justices at Westminster, that partition should be made between them of the manor and tenements aforesaid, with the appurtenances; therefore we command you, that taking with you twelve free and lawful men of the neighborhood of — aforesaid, by whom the truth of the matters may be better known, in your proper person you go to the manor and tenements aforesaid, with the appurtenances, and there in the presence of the parties aforesaid, by you to be forewarned, if they shall be willing to be present, the same manor and tenements, with the appurtenances, by the oath of the said twelve free and lawful men, respect being had to the true value of the manor and tenements aforesaid, with the appurtenances, you cause to be divided into two equal parts, and one of those parts to be delivered and assigned to the said A. B. and C. D. and the other part thereof to the said E. F. to be holden to them and their heirs in severalty, so that neither the said A. B. and C. D. nor the said E. F. may have more of the manor and tenements aforesaid, with the appurtenances, than it belongs to them to have; and that the said A. B. and C. D. of their part to them thereof belonging, and the said E. F. of his part thereof to him belonging, may severally apportion themselves. And that that partition by you so distinctly and openly made, you have here from the day of Easter, in fifteen days, under your seal and the seals of those by whose oath you shall have made that partition; and have you there the names of those by whose oath

[\*1895]

(i) See form, 2 Sel. Prac. 1st edit. 316; 2d edit. 219. The like where first judgment was obtained on defendant's confession, 10 Wentw. 153.

(k) If there was judgment by default, and

the plaintiff declared and proceeded according to the statute, it should be so stated in the writ. So if defendant pleaded *non tenet* simul, and there was a verdict against him.

you shall have made the same partition, and this writ. Witness, Sir N. C. T. knight, at Westminster, the — day of — in the — year of our reign," &c.

PROCEEDINGS IN PARTITION.

"At which day here come as well the said A. B. and C. D. as the said E. F. by their attornies aforesaid. And the sheriff, namely, J. T. esquire, now here, returns a certain partition between the parties aforesaid of the tenements aforesaid, by the said sheriff, by virtue of the aforesaid writ, and according to the form thereof, by the oath of twelve free and lawful men of the neighborhood of — aforesaid made, which follows in these words, to wit, — to wit, I., J. T. esquire, sheriff of the county aforesaid, humbly certify, and return to his majesty's justices, at the day and place in the writ hereunto annexed mentioned, that by virtue of the said writ to me directed, on the — day of — in the 1st year of the reign of King William the Fourth, of Great Britain and Ireland king, defender of the Faith, and so forth, and in the year of our Lord — having taken with me O. P., Q. R., S. T., &c. twelve free and lawful men of my bailiwick, and of the neighborhood in the said writ mentioned, by whom the truth of the matter may be better known, in my proper person did go to the manor and tenements in the said writ specified, and there, by the oath of the said jurors, in the presence of the parties in the said writ named, by me forewarned according to the command of the said writ, and by their assent, the said manor and tenements with their appurtenances, (respect being had to the true value of the same) I did cause to be divided into two equal parts, and one part thereof, that is to say, all those two messuages, two barns, and the land thereto belonging, called the — containing two hundred and twenty acres, two roods, and seven perches, more or less, late in the occupation of W. J. and now of M. D. and his assigns, and all that messuage, &c. [*specifying in like manner the whole apportionment allotted to the demandants*]; and all commons, common of pasture, woods, and underwoods, and trees, ways, waters, easements, and appurtenances to the said several messuages, cottages, farms, lands, woods, grounds, and premises belonging or appertaining, or therewith used and enjoyed; all which said premises are situate, lying, and being in — in my said county; and did cause the same to be delivered and assigned to the said A. B. and C. D. in the said writ named; and the other part thereof, that is to say, all the manor of — in the said county of — with the court baron of the same, and all rights, royalties, members, and appurtenances thereof, and all that barn, farm, and lands, &c. &c. [*specifying the whole apportionment allotted to the defendant*]; all which said messuages, cottages, farms, barns, lands, woods, grounds, and premises, are situate, lying, and being in the parish of — in my county, I did cause to be delivered and assigned to the said E. F. esquire, in the said writ named, to be holden to them and their heirs in severalty, as by the said writ I am commanded, so that neither the said A. B. and C. D. nor the said E. F. might have more of the manor and tenements aforesaid, with the appurtenances, than it belonged to them to have, and that the said A. B. and C. D. of their part to them thereof belonging, and the said E. F. of his part to him thereof

Form of return thereto (1).

[1896]

(1) See form, 2 Sel. Prac. 1st edit. 218; 2d edit. 221; and see 10 Wentw. 154.

PROCEEDINGS IN PARTITION.

belonging, may severally apportion themselves. In witness whereof as well I the said sheriff as the jurors aforesaid to this indented partition, have set our seals, the day and year and place above mentioned.

"J. T. esquire, sheriff."

[\*1397] \*Pleas of land inrolled at Westminster, before Sir James Mansfield, knight, and his brethren, Justices of his Majesty's court of common bench, of Trinity Term, in the — year of the reign of our sovereign lord George the Third, by the grace of God, of the United Kingdom of Great Britain and Ireland king, defender of the faith. Roll, 466, 467, 68, 69.

Pleadings and proceedings in partition by co-heirs in gavel-kind and final judgment (m).

Heretofore, as it appears in the Term of Easter, in the — year of his present majesty's reign, in the 457th and 458th Rolls, it is thus contained:—

Count in partition by co-heirs in gavel-kind, land having descended to three co-heiresses, two of whom married plaintiffs and the third married defendant, W. D. the elder, and died, whereupon W. D. the elder became tenant by the courtesy under the custom of gavel-kind, of a moiety of the third, and other moiety came to his two sons, the other defendants.

[\*1398]

Seisin of S. F.

Dies seque.

Gavel-kind custom (n).

*Kent*, (to wit)—William Daniel the elder, William Daniel the younger, Stephen Daniel, and Joseph Daniel were summoned to answer unto Samuel Baker, and Phoebe his wife, and George Eggleston and Catherine his wife, in a plea wherefore, whereas the same Samuel Baker, and Phoebe his wife, in right of his said wife, and the said William the elder and William the younger, Stephen and Joseph, hold together and undivided one messuage, one barn, one stable, three gardens, three orchards, sixteen acres, twenty-three yards of arable, pasture, meadow, and wood land and common of pasture for all manner of cattle, with the appurtenances, in the several parishes of Bredgate, otherwise Bredgon, and Stockbury, in the county of Kent, of the said William Daniel the elder, William Daniel the younger, Stephen, and Joseph, denying partition to be made between them, according to the form of the Statute in such case made and provided, and unjustly and contrary to the same Statute permits not the same to be done; whereupon the said Samuel and Phoebe, and the said George and Catherine his wife, by George Chilton, their attorney, say, that one Stephen Featherstone, heretofore, to wit, on the — day of — in the year of our Lord — was seised of the said messuages, tenements, and hereditaments, with the appurtenances, in his demsene, as of fee; and being so thereof seised the said Stephen Featherstone had issue female of his body lawfully begotten, to wit, Phoebe Baker, Catherine, now the said Catherine Eggleston, and Elizabeth, and the said Stephen Featherstone being so thereof possessed, afterwards, to wit, on the day and year aforesaid, at the parish of Bredgate, otherwise Bredgon, in the county of Kent aforesaid, died of such his estate therein seised; and because the said messuages, tenements, and hereditaments, with the appurtenances, are, and from time whereof the memory of man is not to the contrary, were of the tenure and nature of gavel-kind, and all lands and tenements, with the appurtenances, which are of the tenure and nature of gavel-kind, in the county aforesaid, are, and from time whereof the memory of man is not to the contrary, were partable, and parted between the heirs male, in default of heirs male, among the heirs female, the same

(m) These are the pleadings in the case of Baker v. Daniel, 1 Marsh. 537.

(n) See statement of this custom, Herne's Pleadings, 686.—1 Burr. 326.—3 Bla. Com.

84.—Rob. on Gav.<sup>o</sup>c. 4. p. 38, 136, 157.—Co. Ent. 602. 411 b.—Co. Litt. 175, a. 265. Rest. Ent. 449, 450, 452.

messuage, tenements, and hereditaments, with the appurtenances, then and there descended and came to the said Phœbe, Catherine, and Elizabeth, as daughters and co-heir female of the said Stephen Featherstone, there being no heirs, or heir male of the body of the said Stephen Featherstone, lawfully begotten; whereby the said Phœbe, Catherine, and Elizabeth, entered into the said messuage, tenements, and hereditaments, with the appurtenances; and were thereof then and there seised in their demesne, as of fee, as daughters and co-heir as aforesaid; and the said Phœbe being so seised, afterwards, to wit, on the — day of — in the year of our Lord — at the parish first aforesaid, intermarried with the said Samuel Baker, whereby, and by reason of the said marriage, the said Samuel and Phœbe became and were seised of one undivided third part of the said messuages, tenements, and hereditaments in their demesne, as of fee, in right of the said Phœbe. And the said Catherine, being so seised as aforesaid, she, the said Catherine, afterwards, to wit, on the — day of — in the year of our lord — at the parish first aforesaid, intermarried with the said George Eggleston, and by reason thereof they, the said George, and the said Catherine, then and there became and were seised in their demesne, as of fee, of one other undivided third of and in the said messuage, tenements, and hereditaments, with the appurtenances, in right of his said wife. And the said Elizabeth being so possessed as aforesaid, afterwards, to wit, on the — day of — in the year of our Lord — at the parish aforesaid, intermarried with the said Daniel the elder, whereupon the said William and the said Elizabeth, became and were seised in their demesne as of fee, of the other undivided third of the aforesaid messuage, tenements, and hereditaments, with the appurtenances, in right of his said wife. And the said Samuel, and Phœbe his wife, and the said George, and Catherine his wife, in fact further say, that the said Elizabeth Daniel, after her said intermarriage, had issue male of her body lawfully begotten by the said William Daniel the elder, her said husband, to wit, the said William Daniel the younger. And the said Stephen and Joseph, the now defendants, and afterwards, to wit, on the — day of — in the year of our Lord — died, to wit, at the parish first aforesaid, in the county aforesaid, and the said William Daniel the elder, her said husband, survived her, and the said Samuel, and Phœbe his wife; and the said George, and Catherine his wife, in fact further say, that the said messuage, tenements, and hereditaments, with the appurtenances, having so been and being of the tenure and nature of gavel kind, in the county of Kent aforesaid, the husband of any wife dying seised of any lands or tenements, in the said county, of the said nature or tenure in his demesne, from time immemorial used and approved, of right ought, and have been used, to hold and enjoy the moiety of all such lands and tenements, of which such wife died seised as aforesaid, after the death of such wife so dying seised as aforesaid, during the life of such husband, if and as long as such husband, live sole and unmarried, whether or not such husband had issue of the body of his said wife male or female lawfully begotten. Whereby

PROCEEDINGS IN PARTITION.

Descent to his three daughters as co-heirs (c).

[\*1399]

PROCEED-  
INGS IN  
PARTITION

[\*1400]

and by force of the said custom and tenure of gavel kind, the said William Daniel the elder, upon the death of his said wife, became and was seised in his demesne, as of freehold, for the term of his life, of one moiety of the said purpart or undivided third of the said Elizabeth Daniel, of and in the said messuage, tenements, and hereditaments, to hold to him the said William Daniel the elder, as tenant by the courtesy, by force and virtue of the said tenure or custom gavel kind, in the said county, for and during the term of his natural life, if he lived sole and unmarried, the reversion thereof to the said William the younger, Stephen, and Joseph, as sons and co-heir of the said Elizabeth Daniel, and their heirs belonging. And the other moiety, or half part of the said undivided third part of the said Elizabeth Daniel, in her life-time, and at \*the time of her death in the said messuages, tenements, hereditaments, descended, with the appurtenances, upon her death as aforesaid, and came to the said Stephen, William the younger, and Joseph, as sons and co-heirs of the said Elizabeth Daniel, and they the said William the younger, Stephen, and Joseph, then and there became and were seised in their demesne, as of fee, of the same moiety or half part, to wit, at the parish first aforesaid, in the county aforesaid. And so the said Samuel, and Phoebe his wife, and the said George and Catherine his wife, say, that they, that is to say, the said Samuel, and his said wife, in right of his said wife, and the said George, and his said wife, in right of his said wife and the said William Daniel the elder, William Daniel the younger, Stephen, and Joseph, together, and without division, hold the said messuage, tenements, and hereditaments, with the appurtenances, of the inheritance, which was of the said Stephen Featherstone, deceased, the father of the said Phoebe, Catherine, and Elizabeth, three co-heirs female of which said Stephen Featherstone of his body begotten, the said Phoebe and Catherine are, whereof the said Samuel and Phoebe, in right of the said Phoebe, and the heirs of the said Phoebe (p), doth belong to have one-third part of the messuages, tenements, and hereditaments aforesaid, with the appurtenances, into three parts equally to be divided; and to the said George and Catherine his wife, in right of his said wife, and to the heirs of the said Catherine, doth belong to have one other third part of the same messuage, tenements, and hereditaments, with the appurtenances, to be divided as aforesaid, to hold to them in severalty, so that the said Samuel and Phoebe his wife, in right of his said wife, of their purpart to them, out of the messuages, lands, tenements, and hereditaments, aforesaid, with the appurtenances happening; and the said George and Catherine his wife, in right of his said wife, of their purpart out of the said messuage, tenements, and hereditaments aforesaid, with the appurtenances happening, may severally themselves appropriate and apportion. Yet the said William Daniel the elder, William Daniel the younger, Stephen Daniel, and Joseph Daniel, to make partition between them according to the form of the Statute in such case made and provided, have hitherto denied and refused, and still do refuse, and the same unjustly do not suffer to be done. Whereupon \*the said

[\*1401]

Samuel, and Phoebe his wife, and the said George and Catherine say, that

(p) This is an amendment, see 1 Marsh. 537.



they are injured, and have sustained damage to the value of £500, and therefore they bring their suit, &c.

PROCEEDINGS IN PARTITION.

And the said William Daniel the elder, William Daniel the younger, Stephen Daniel and Joseph Daniel, being duly summoned by his writ of *posse*, returnable on the morrow of the Holy Trinity, according to the form of the Statute in such case made and provided, came not, within fifteen days after the return of the said writ according to the said Statute, nor defend the force and injury, when, &c. nor appear to say any thing in bar or preclusion of the said action of the said Samuel Baker, and Phoebe his wife, and George Eggleston, and Catherine his wife, why partition ought not to be made between them and the said William Daniel the elder, William Daniel the younger, Stephen Daniel and Joseph Daniel, of the tenements aforesaid, with the appurtenances, in form aforesaid; by which the said Samuel Baker, and Phoebe his wife, and George Eggleston, and Catherine his wife, remain therein undefended against the said William Daniel the elder, William Daniel the younger, Stephen Daniel, and Joseph Daniel; and thereupon, because the court of our said lord the king, of the Bench here, are not yet advised what judgment to give of and upon the premises, a day is therefore given to the parties aforesaid, before the said justices of the Bench at Westminster until the morrow of All Souls, in the — year of the reign aforesaid, to hear the judgment of the said court thereupon, for that the said court of our said lord the king of the Bench now here, are not yet advised thereof. At which day, before the justices aforesaid, come the said Samuel Baker, and Phoebe his wife, and George Eggleston, and Catherine his wife, by their attorney aforesaid; but the said William Daniel the elder, William Daniel the younger, Stephen Daniel, and Joseph Daniel, come not. And thereupon because the court of said lord the king of the Bench here, are not yet advised what judgment to give of and upon the premises, a further day is thereupon given to the said parties, before the said justices of the Bench at Westminster, until in eight days of St. Hilary, in the — year of the reign aforesaid, to hear the judgment of the said court thereupon, for that the court of our said lord the king of the Bench, now here, are not yet advised thereof. At which day, &c. [*Two continuances until Trinity Term, and then proceed as follows:*]—And hereupon it is considered, according to the form of the Statute in such case made and provided, that partition be thereof made between the said Samuel Baker, and Phoebe his wife, George Eggleston, and Catherine his wife, and the said William Daniel the elder, William Daniel the younger, Stephen Daniel, and Joseph Daniel, of the tenements aforesaid, with the appurtenances; and it is commanded to the sheriff, that in his proper person he go to the tenements aforesaid, with the appurtenances, and there, in the presence of the parties aforesaid, by him to be forewarned, if they shall be willing to be present, the tenements aforesaid, with the appurtenances, by the oath of good and lawful men of his county, respect being had to the true value of the said tenements, with the appurtenances, he cause to be divided into three equal parts, and one part he cause to be delivered to the said Samuel Baker, and Phoebe his

Defendant makes default (g).

Continuance by Curia advisari vult

Further continuance.

[\*1402]

Judgment of partition and award of writ to sheriff de partitione facienda.

(g) The defendant made default, and the court examined the title of the demandant, according to 8 & 9 W. 3, c. 81; and 3 & 4 Ann. c. 18, s. 2.—2 Sell. Prac. 2d edit. 218.—2 Bla. Rep. 1184, 1189.

PROCEED-  
INGS IN  
PARTITION.

[ \*1408 ]

Sheriff's  
return.

wife, another part thereof to the said George Eggleston, and Catherine his wife, and the third and remaining part thereof to the said William Daniel the elder, William Daniel the younger, Stephen Daniel, and Joseph Daniel, to be holden in severalty, so that neither the said Samuel Baker, and Phoebe his wife, nor the said George Eggleston and Catherine his wife, nor the said William Daniel the elder, William Daniel the younger, Stephen Daniel, and Joseph Daniel, may have more than respectively belongs to them of the tenements aforesaid, with the appurtenances; and the said Samuel Baker, and Phoebe his wife, George Eggleston, and Catherine his wife, of their respective two parts belonging to them, of the tenements aforesaid, with the appurtenances; and the said William Daniel the elder, William Daniel the younger, Stephen Daniel, and Joseph Daniel, of their third part belonging to them, may severally apportion themselves, and that partition by the said sheriff, distinctly and openly made, he have here on the morrow of All Souls, under his seal, and the seals of those by whose oath he shall have made that partition; and that he have there the names of those by whose oath he shall have made the same partition, together with the writ of our 'lord the king, to him thereupon directed, the same day is given to the parties aforesaid here; and at which day the sheriff, to wit, John Cator, Esq. sheriff of Kent aforesaid, now returns here a certain partition made by and before him the said sheriff, between the parties aforesaid, of the said tenements, with the appurtenances, by virtue of the writ aforesaid, by the oath of twelve good and lawful men of his county, which said partition follows in these words:—

**Inquisition.** *Kent*, to wit.—An inquisition taken at the house of — Elliott, commonly called or known by the name or sign of the Sun, in the parish of Bredgon, in the county aforesaid, on Thursday, the 9th day of September, in the 53d year of the reign of our sovereign lord George the Third, by the grace of God, of the United Kingdom of Great Britain and Ireland king, defender of the Faith, and in the year of our Lord 1813, before John Cator, Esq. sheriff of the said county, by virtue of this writ of *partitione facienda*, to me directed, commanding me to cause one messuage, one barn, one stable, three gardens, three orchards, 16 acres and three yards of arable, pasture, meadow, and wood land, and common of pasture, for all and all manner of cattle, with the appurtenances, in the several parishes of Bredgate, otherwise Bredgon and Stockbury, in the said county, to be divided into three equal parts, and one of those parts to be delivered and assigned to Samuel Baker, and Phoebe his wife, to be holden to them and the heirs of the said Phoebe (*r*), to be lawfully begotten, and one third part to George Eggleston, and Catherine his wife, to be holden to them and the heirs of the said Catherine (*r*), and the remaining third part to William Daniel the elder, William Daniel the younger, Stephen Daniel, and Joseph Daniel, to be holden in severalty, on the oath of William, otherwise Richard Bathurst, Thomas Pye, Stephen Wood, Richard Wood, William Read, James Benslade, &c. &c. twelve free and lawful men of the said county, being charged and sworn to inquire of all and singular the matters and things in the said writ mentioned and contained, on their oath say,

(*r*) See amendment, 1 March. 587.

that the said barn, barn-yard, third part, lands and premises, with the appurtenances following, (that it to say), all that barn, and part of the barn-yard, as the same is staked off, \*containing 15 perches, situate in Bredgate, otherwise Bredgon aforesaid, and also an equal third part of the well, being in the said barn-yard; and also so much and such part of a certain field, called the Home Field, situate in Bredgate, otherwise Bredgon aforesaid, as contains one acre, one rood, and 35 perches, and as the same is staked off from the remaining part, which is assigned to George Eggleston, and Catherine his wife; and also all that field called the Middle Field, situate in the parish of Stockbury aforesaid, containing two acres, one rood, and 15 perches, and one equal part of a certain piece of woodland, situate in Bredgate, otherwise Bredgon aforesaid, containing two roods, or thereabouts, the remaining half-part being assigned unto the said George Eggleston, and Catherine his wife, together with such common of pasture as is appurtenant to the parts and premises before described, are one equal third part of the messuage, stable, garden, orchards, lands, and common of pasture, with the appurtenances, specified in the said writ, and that the part of the messuage, or tenement, and barn-yards, third part lands and premises, with the appurtenances following, (that is to say,) all that part of a messuage or tenement under, divided into two tenements, which is situate at the north end of the said messuage or tenements, in the parish of Bredgate, otherwise Bredgon aforesaid, and now in the occupation of the said George Eggleston; and also an equal half-part of the garden used with the said messuage, as the same is staked off, and a certain part of the barn-yard there, as the same is also staked off, containing altogether 15 perches, and also one equal third part of the well, being in the same yard, and also a part of a certain field, called the Home Field, containing one acre, one rood, and four perches, situate in Bredgon aforesaid; and also all that field, called the Wood Field, containing two acres, two roods, and 32 perches, in Bredgon aforesaid; and also one equal half-part of a certain piece of woodland, containing two roods, and also in Bredgon aforesaid, together with such common of pasture as is appurtenant to the part and premises, are one other equal third part thereof, and that the parts of the messuage, third parts, lands, and premises, with the appurtenances following, (that is to say), all that part of a messuage or tenement, under one roof, divided into two tenements, which is situate and being at the south end of the said messuage or tenement, in the parish of Bredgate, otherwise Bredgon \*aforesaid, now in the occupation of William Daniel the elder; and also one equal part of the garden, used with the said messuage or tenement, as the same is staked off, containing 20 perches; and also all that piece or parcel of land, called the barnfield, containing one acre, two roods, and 19 perches, situate in Bredgon aforesaid; and also all that piece or parcel of land called Upper Stockbury Field, containing two acres, two roods and 36 perches, in Stockbury aforesaid; and also one third part of the well, being in the barn-yard there, together with such common of pasture as is appurtenant to the parts and premises before described, are the remaining equal third part thereof; and the said messuage, barn, stable, gardens, orchards, lands, and common of pasture, with the appurtenances, being so into three equal parts divided, the said sheriff having respect to the true value thereof, on the day and year aforesaid, in the pres-

PROCEED-  
INGS IN  
PARTITION.  
[\*1404]

[\*1405]

PROCEED-  
INGS IN  
PARTITION.

[\*1406]

ence of the jurors aforesaid the said first-mentioned equal third part, viz. all that barn and part of the barn-yard, as the same is staked off, containing 15 perches, situate in Bridgate, otherwise Bredgon aforesaid; and also one equal third part of the well being in the barn yard, and also so much and such part of a certain field, called the Home Field, situate in Bredgate, otherwise Bredgon aforesaid, as contains one acre, one rood, and 34 perches, and as the same is staked off from the remaining part, which is assigned unto the said George Eggleston, and Catherine his wife; and also all that field, called the Middle Field, situate in the parish of Stockbury aforesaid, containing two acres, one rood, and 15 perches; and also one equal half-part of a certain piece of wood-land, situate in Bredgate, otherwise Bredgon aforesaid, containing two roods, or thereabouts, the remaining half part being assigned unto the said George Eggleston, and Cathrine his wife, together with such common of pasture as is appurtenant to the parts and premises before described, to the said Samuel Baker, and Phœbe his wife, have caused to be delivered and assigned, to be holden to them and the heirs of the said Phœbe, and the second mentioned equal third part, viz. all that part of a messuage or tenement, under one roof, divided into two tenements, which is situate at the north end of the said messuage or tenement in the said parish of Bredgate, otherwise Bredgon aforesaid, and now in the occupation of George Eggleston; and also an equal half-part of the garden, used with the said messuage, as the same is staked off, containing altogether 15 perches; and also one equal third part of the well, being in the said yard; and also a part of a certain field called the Home Field, containing one acre, one rood and four perches, situate in Bredgon aforesaid; and also all that field called the Wood Field, containing two roods, situate also in Bredgon, together with such common of pasture as is appurtenant to the parts and premises, to the said George Eggleston, and Catherine his wife, have caused to be delivered and assigned, to be holden to them and the heirs of the said Catherine, and the remaining or last-mentioned equal third part herein before described, viz. all that part of a messuage or tenement, under one roof, divided into tenements, which is situate and being at the south end of the said messuage or tenement, in the said parish of Bredgate, otherwise Bredgon aforesaid, now in the occupation of William Daniel the elder; and also one equal half-part of the garden used with the said messuage or tenement, as the same is staked off, containing 20 perches, and also that piece or parcel of land called the Barn Field, containing one acre, two roods, and 19 perches, situate in Bredgate aforesaid; and also all that piece or parcel of land, called Upper Stockbury Field, containing two acres, two roods, and 38 perches, situate in Stockbury aforesaid; and also one third part of the well, being in the barn-yard there, together with such common of pasture as is appurtenant to the parts and premises hereinbefore described, to the said William Daniel the elder, William Daniel the younger, Stephen Daniel, and Joseph Daniel, have caused to be delivered and assigned, to be holden to them and their heirs in severalty, by the assignment and allotment made as aforesaid, according to the exigency of the said writ, so that neither the said Samuel Baker, and Phœbe his wife, the said George Eggleston, and Catherine his wife, nor the said William Daniel the Elder, William Daniel the younger, Stephen Daniel, and Joseph Daniel, have more of said messuage, barn, stable, gar-

dens, orchards, lands, and common of pasture aforesaid, with the appurtenances, than to them thereof belongs, and the said Samuel Baker, and Phoebe his wife, George Eggleston, and Catherine his wife, William Daniel the elder, William Daniel the younger, Stephen Daniel and Joseph Daniel, may severally apportion themselves. In witness whereof, as well I the said sheriff as the said jurors, have set our seals, the day and year, [\*1407] and at the place above mentioned.

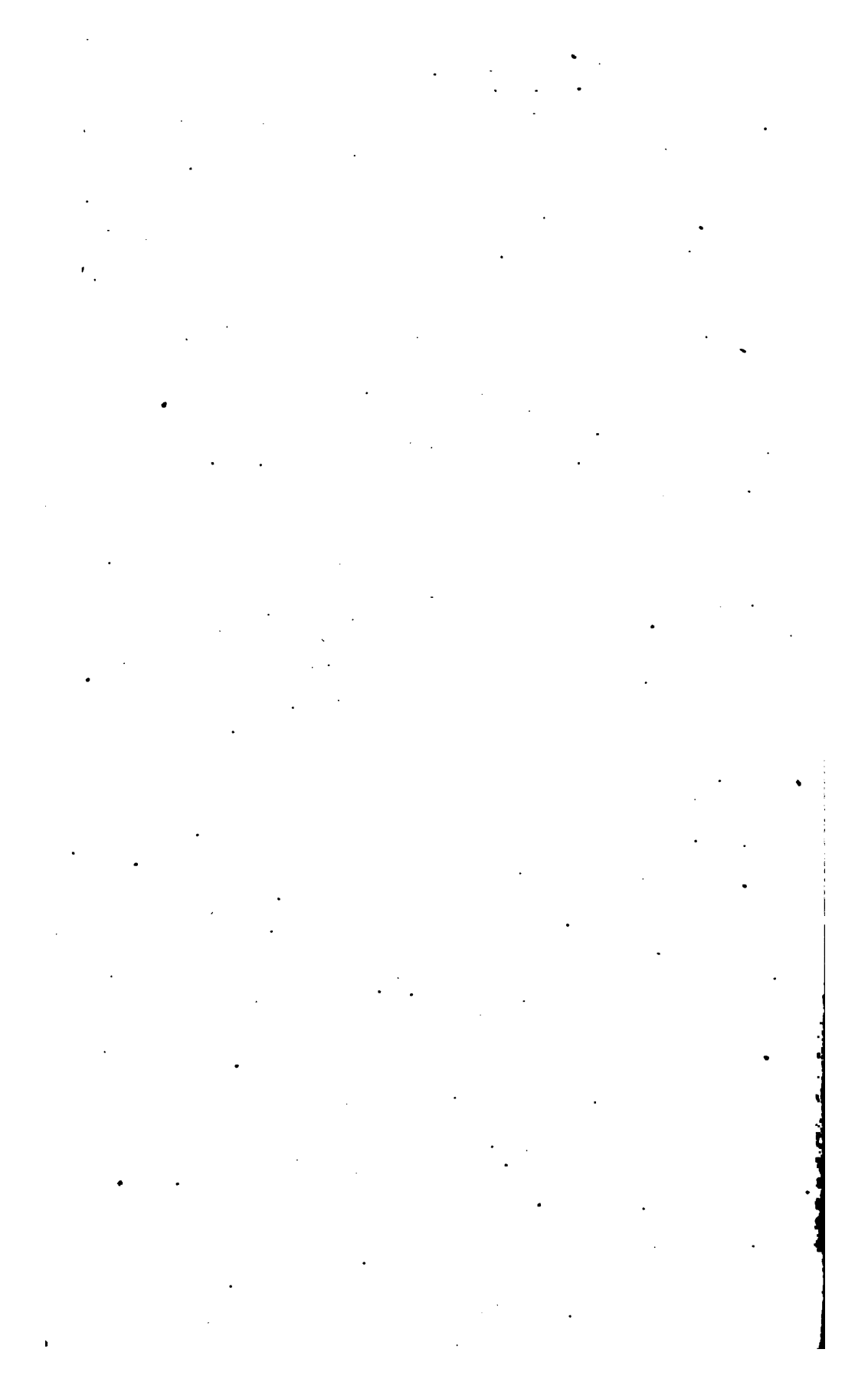
PROCEEDINGS IN PARTITION

JOHN CATOR, Esq. sheriff.

Therefore it is considered that the partition aforesaid be held firm and effectual for ever.

Final judgment in partition (s).

(s) See form, 2 Sell. Prac. 1st ed. 319; 2d ed. 222.



## APPENDIX OF FORMS

ADAPTED TO

THE RECENT LEADING AND OTHER RULES.

## MODELS OF CONCISENESS

IN

## DECLARATIONS IN ASSUMPSIT AND DEBT,

AS PRESCRIBED BY REG. GEN. TRINITY TERM, 1 W. 4, AND  
REG. GEN. HILARY TERM, 4 W. 4.

THE very great and important improvement in the *Forms of Pleadings* are attributable principally to the Statutes 11 G. 4 and 1 W. 4. c. 70, s. 11, and 3 & 4 W. 4, c. 42, s. 1, and to the General Rules of Trinity Term, 1 W. 4, and Hilary Term, 4 W. 4. It should be understood by all practitioners that the excellent concise forms of declarations in *assumpsit* and *debt* prescribed in the Reg. Gen. 1 W. 4, were intended by the judges as *models* for imitation not only in those particular instances, but also on all other occasions when they could possibly be applied. The late lord Tenterden, certainly the most distinguished pleader and lawyer of his time, honored the author by delivering to him a copy of those rules in manuscript, and requesting him with a view to conciseness, to strike out every allegation, *even to a word*, the omission of which would not subject either of the forms to a *sustainable special demurrer*; and in consequence the author suggested some few abbreviations, which he has the satisfaction of knowing were adopted when the rules were ultimately promulgated. According to the examples given in those rules, it would suffice in all cases, in describing a contract not under seal, to state that the *defendant promised*, without as heretofore using and repeating the words "*undertook and then and there faithfully promised*." It will be observed that the length of the *indebitatus* counts are by the same rule very materially shortened; and although there is no *express* enactment or rule prohibiting the use of the *quantum meruit* or *quantum valebant* counts, yet their use is *impliedly* to be abandoned, especially as the Reg. Gen. Hil. Term, 4. W. 4, prohibits any second count on the same subject of debt, and it is manifest that the *indebitatus* count was always sufficient, and the *quantum meruit* or *valebant* counts were unnecessary, (2 Saunders' Rep. 122 a, note 2,) and now it would be improper to attempt to introduce either of those counts and consequently many of the forms in the fifth edition of this work are entirely useless, though it is singular that the learned commentator, Sir William Blackstone, enumerated those very counts as in-

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1 W. 4.  
Observations on these in general.

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stances of the use of a second count to prevent a nonsuit on an indebtedness count, in consequence of the plaintiff's inability to prove a contract to pay a *fixed price* for work or goods, a doctrine that has changed by decision and not by express enactment.

As the forms prescribed by Reg. Gen. Trin. Term, 1 W. 4, were certainly intended *as models or examples to be extended* and applied much beyond the instances, and as far as practicable to other cases, it is considered advisable here to give them at length as proper subjects of constant reference. Some notes are subscribed to those forms, in which it is attempted to show that even some of the statements suffered to continue in the promulgated forms, might safely be omitted, on the principle that the *omission* would not subject the declaration to a special demurrer. It is farther to be observed that the Reg. Gen. Trin. Term, 1 W. 4, was promulgated at a time when, according to the existing law, it was absolutely necessary to *repeat place or venue*, as well as time, to every new allegation; see 14 East's Rep. 300; and 11 Price, 400. By the subsequent General Pleading Rule of Hil. Term, 4 W. 4, *venue* is alone to be stated in the *margin* and is *not to be repeated* in the *body*, and though the repetition would not be demurrable, yet it might be the subject of an application by summons to strike out the useless and now improper repetition of venue or place. It is therefore to be understood that throughout the following prescribed forms venue or place in a body of the declaration or count is to be erased.

## REGULA GENERALIS.

TRINITY TERM, 1 WILLIAM IV. 1831.

*Recites that declarations on bills, notes and common counts, may be drawn concisely, and orders that if any declaration in assumpsit or debt for demands mentioned in the schedule of forms, or demands of a like nature, shall exceed the length of the form applicable*

Whereas declarations in actions upon bills of exchange, promissory notes, and the counts, usually called the common counts, occasion *unnecessary* expense to parties by reason of their length, and the same may be drawn in a more concise form; now for the prevention of such expense, It is ordered, that if any declaration in *assumpsit* hereafter filed or delivered, and to which the plaintiff shall not be entitled to a plea as of this term, being for any of the demands mentioned in the schedule of forms and directions annexed to this order, or *demands of a like nature* (a) shall exceed in length such of the said forms set forth or directed in the said schedule, as may be applicable to the case; or if any declaration *in debt* to be so filed or delivered for similar causes of action, and for which the action of *assumpsit* would lie, shall exceed such length, no costs of the excess shall be allowed to the plaintiff if he succeeds in the cause; and such costs of the excess as shall have been incurred by the defendant, shall be taxed and allowed to the defendant, and be deducted from the costs allowed to the plaintiff. And it is further ordered, that on the taxation of costs as between attorney and client, no costs shall be allowed to the attorney in respect of any such excess of length; and in case any costs shall be payable by the plaintiff to the defendant on account of such excess

(a) The words in this rule, "or demands of a like nature," and the direction as to drawing *foreign bills*, *post*, 32, seem to establish that these particular forms are merely

given as a few instances, and that in all other cases, at least of *common debts*, it is intended that the pleadings may and ought to be framed in the like concise manner.



the amount thereof shall be deducted from the amount of the attorney's bill.

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1 W. 4.

TENTERDEN.  
N. C. TYNDAL.  
LYNDHURST.  
J. BAYLEY.  
J. A. PARK.  
J. LITTTEDALE.  
S. GASELEE.

J. VAUGHAN.  
J. PARKE.  
W. BOLLAND.  
J. B. BOSANQUET.  
W. E. TAUNTON.  
E. H. ALDERSON.  
J. PATTERSON.

to the case,  
plaintiff's  
attorney  
shall have  
no costs of  
the excess,  
but shall  
defray the  
same (a).

SCHEDULE OF FORMS AND DIRECTIONS. (b).

For that whereas the defendant on the — day of — in the year of our Lord —, at London [or "in the county of —"] made his promissory note in writing, *and delivered the same to the plaintiff*, and thereby promised to pay to the plaintiff £—, — days [or "weeks," or "months,"] after the date thereof, [or *as the fact may be*] which period has now elapsed, [or *if the note be payable to A. B., and then and there delivered the same to A. B.,* and thereby promised to pay to the said A. B., or order, £— — days [or "weeks," or "months,"] after the

1. Count  
on a prom-  
issory note  
against the  
maker, by  
payee or  
indorsee,  
as the case  
may be.

(a) See ante, 1410, note (a).

(b) It will be found that the following forms considerably diminish the usual length of counts of this nature, by omitting the long-used formal modes of stating each fact; such as in stating an acceptance—"and which said bill of exchange the said defendant afterwards, to wit, on the day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, upon sight thereof accepted, according to the said usage and custom of merchants from time immemorial used and approved of;" and which is now to be thus shortly stated—"and the defendant then accepted the said bill," and so on. The concise mode of stating an indorsement, which has long been recommended and partially used, (see Chitty on Bills, 7th ed. 474,) is now enjoined.

But even in some of these prescribed forms there are unnecessary allegations; as in the 1st, 3d, 5th, 8th and 11th forms, which state unnecessarily the *delivery* of the note or bill to the plaintiff or indorsee, (7 T. R. 596; 5 East, 478; Bayley on Bills, 180;) and in the 1st and 6th forms, the statement of the *notice* to the defendant: of the indorsements are unnecessary, (1 Bos. & Pul. 654; Bayley on Bills, 184;) and in the 4th, 5th, 6th, 7th, 8th, 9th, 10th, and 11th forms, and consequently in the directions relative to declarations on foreign bills, the statements that the bill was *directed to the drawee or acceptor* are clearly unnecessary, (Gray v. Milner, 8 Moore's Rep. 91; 2 Stark. Rep. 336.) The allegation, "*which period has now elapsed*," though otherwise unobjectionable, seems also unnecessary where the bill or note has been shown to have been payable after date, or where there is an averment that it was presented for payment *when due*. In the 4th, 5th, 7th, and

8th counts against the acceptor, where a general unqualified acceptance is stated, it would suffice to state the promise to pay according to the tenor of the bill, omitting "*and of his acceptance thereof*."

In the common *indebitatus* forms also, it is submitted, that some of the words printed in italics might be omitted, viz.—"*price and value*," "*and then and there*," and some other words which were not adopted even in the ancient forms.

These observations are not made in disparagement of this excellent rule, but merely to show how much the pleadings may be contracted when there is a disposition to save expense.

It is clearly intended by these rules that the use of the *quantum meruit* and *quantum valebant* counts should be abandoned as being certainly unnecessary, and that *all* debts, however numerous, shall be comprised, as they always might have been, (Cro. Jac. 245; 10 B. & C. 342, *post*.) in one count, and that *separate* formal commencements and conclusions in the description of each debt shall no longer be adopted.

The comprehensive collection of the different descriptions of almost every possible demand recoverable in assumpsit under an *indebitatus* count in assumpsit and debt in the following pages, will be found in this edition altered according to these rules. Each practitioner should study further curtailment when practicable.

Of course the declaration must vary according to the circumstances of each particular case. When the action is on a bill or note, one of the following forms is to be selected, and a count on the original debt and on an account stated may be added, but no more.

**RAG. GWR.** date thereof, [*or as the fact may be*] which period has now elapsed, and  
**TRIN T.** the said A. B. then and there indorsed the same to the plaintiff, *whereof*  
**1 W. 4.** the defendant then and there had notice, and then and there in considera-  
**Indorsee** tion of the premises promised to pay the amount of the said note to the  
**against** plaintiff according to the tenor and effect thereof.  
**maker.**

**2. Count** Whereas (c) one C. D. on the — day of —, in the year of our  
**on a prom-** Lord —, at London [*or “in the county of —,”*] made his promis-  
**issory note** sory note in writing, and thereby promised to pay the defendant, or order,  
**against** £—, — days [*or “weeks,” or “months,”*] after the date thereof,  
**payee by** [*or as the fact may be*] which period has now elapsed, and the defendant  
**an indor-** then and there indorsed the same to the plaintiff, [*or “and the defendant*  
**see. then and there indorsed the same to X. Y., and the said X. Y. then and  
**Several in-** there indorsed the same to the plaintiff,”] and the said C. D. did not pay  
**dorsee- the amount thereof, although the same was there presented to him on the  
**ments.** day when it became due, of all of which the defendant then and there had  
 due notice.****

**3. Count** Whereas one C. D. on —, at London [*or “in the county of —,”*]  
**on a prom-** made his promissory note in writing, and thereby promised to pay X. Y.,  
**issory note** or order, £—, — days [*or “weeks,” or “months,”*] after the date  
**against in-** thereof, [*or as the fact may be,*] which period has now elapsed, and then  
**dorser by** and there delivered the said note to the said X. Y., and the said X. Y.  
**indorsee.** then and there indorsed the same to the defendant, and the defendant  
 then and there indorsed the same to the plaintiff, [*or “and the de-*  
*defendant then and there indorsed the same to Q. R., and the said Q. R.*  
*then and there indorsed the same to the plaintiff,”*] and the said C. D. did  
 not pay the amount thereof, although the same was there presented to  
 him on the day when it became due, of all which the defendant then and  
 there had due notice.

**4. Count** Whereas the defendant on — at London [*or “in the county of —,”*]  
**on an in-** made his bill of exchange in writing, and directed the same to the defend-  
**land bill** ant, and thereby required the defendant to pay to the plaintiff £—,  
**of exchange** — days [*or “weeks,” or “months,”*] after the date [*or “sight,”*] there-  
**against the** of, which period has now elapsed, and the defendant then and there accept-  
**acceptor** ed the said bill, and promised the plaintiff to pay the same, according to  
**by the** the tenor and effect thereof, and his said acceptance thereof, but did not  
**drawer,** pay the same when due, or at any time before or since.  
**being also**  
**payee.**

**5. Count** Whereas the plaintiff on —, at London [*or “in the county of —,”*]  
**on an in-** made his bill of exchange in writing, and directed the same to the defend-  
**land bill of** ant, and thereby required the defendant to pay to O. P., or order, £—,  
**exchange** — days [*or “weeks” or “months,”*] after the date [*or “sight”*]  
**against the** thereof, which period has now elapsed, and then and there delivered the  
**acceptor by** same to the said O. P. and the said defendant then and there accepted the  
**the drawer** same, and promised the plaintiff to pay the same, according to the tenor  
**not being** and effect thereof, and of his acceptance thereof, yet he did not pay the  
**the payee.** amount thereof although the said bill was there presented to him on the day

(c) If either this or the subsequent forms should constitute the first count of the declaration, then insert, “For that;” so that it will read, “For that whereas one C. D.” &c.  
 If it be a second or subsequent count, then insert, “And,” “also;” so that it will read, “And whereas also one C. D.” &c.

when it became due, and thereupon the same was then and there returned to the said plaintiff, of all which the defendant then and there had notice. REG. GEN. TRIN. T. 1. W. 4.

Whereas one E. F. on —, at London, [or “in the county of —,”] made his bill of exchange in writing, *and directed the same to the defendant*, and thereby required the defendant to pay to the said E. F. [or to “G. H.”] or order, £—, — days [or “weeks,” or “months,”] after sight [or “date”] thereof, *which period is now elapsed*, and the defendant then and there accepted the said bill, and the said E. F. [or “the said G. H.”] then and there indorsed the same to the plaintiff, [or “and the said E. F.,” or “the said G. H. then and there indorsed the same to K. J., and the said K. J. then and there indorsed the same to the plaintiff,”] *of all which the defendant then and there had due notice*, and then and there promised the said plaintiff to pay the amount thereof, according to the tenor and effect thereof, *and of his acceptance thereof*. 6. Count on an inland bill of exchange against the acceptor by indorsee.

Whereas one E. F. on —, at London, [or “in the county of —,”] made his bill of exchange in writing, *and directed the same to the defendant*, and thereby required the defendant to pay to the plaintiff £—, — days [or “weeks,” or “months,”] after the sight [or “date”] thereof, *which period has now elapsed*, and the defendant then and there accepted the same, and promised the plaintiff to pay the same, according to the tenor and effect thereof, *and of his acceptance thereof*. 7. Count on an inland bill of exchange against the acceptor by the payee.

Whereas the defendant on —, at London, [or “in the county of —,”] made his bill of exchange in writing, *and directed the same to J. K.*, and thereby required the said J. K. to pay to the plaintiff £—, — days [or “weeks,” or “months,”] after the sight [or “date”] thereof, *and then and there delivered the same to the said plaintiff*, and the same was then and there presented to the said J. K. for acceptance, and the said J. K. then and there refused to accept the same, of all which the defendant then and there had due notice. 8. Count on an inland bill of exchange against the drawer by payee on non-acceptance.

Whereas the defendant on —, at London [or “in the county of —,”] made his bill of exchange in writing, *and directed the same to J. K.*, and thereby required the said J. K. to pay to the order of the said defendant £—, — days [or “weeks,” or “months,”] after the sight [or “date”] thereof, and the said defendant then and there indorsed the same to the plaintiff, [or “and the said defendant then and there indorsed the same to L. M., and the said L. M. then and there indorsed the same to the plaintiff,”] and the same was then and there presented to said J. K. for acceptance, and the said J. K. then and there refused to accept the same, of all which the defendant then and there had due notice. 9. Count on an inland bill of exchange against the drawer by indorsee on non-acceptance.

And whereas one N. O. on —, at London, [or “in the county of —,”] made his bill of exchange in writing, *and directed the same to P. Q.*, thereby required the said P. Q. to pay to his order £—, — days [or “weeks,” or “months,”] after the date [or “sight”] thereof, and the said N. O. then and there indorsed the said bill to the defendant, [or “to 10. Count on an inland bill of exchange against indorser by indorsee,

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on non-ac-  
ceptance.

R. S., the said R. S. then and there indorsed the same to the defendant,"] and the defendant then and there indorsed the same to the plaintiff, and the same was then and there presented to the said P. Q. for acceptance, and the said P. Q. then and there refused to accept the same, of all which the said defendant then and there had due notice.

11. Count  
on an in-  
land bill of  
exchange  
against  
payee by  
indorsee  
on non-  
acceptance.

Whereas one N. O. on —, at London, [or "in the county of —,"] made his bill of exchange in writing, and directed the same to P. Q., and thereby required the said P. Q. to pay to the defendant, or order £—, — days [or "weeks," or "months,"] after the sight [or "date,"] thereof, and then and there delivered the same to the defendant, and the defendant then and there indorsed the said bill to the plaintiff, [or "to R. S., and the said R. S. then and there indorsed the same to the plaintiff,"] and the same was then and there presented to the said P. Q. for acceptance, and the said P. Q. then and there refused to accept the same, of all which the defendant then and there had due notice.

12. Direc-  
tions for  
declara-  
tions on  
bills where  
action  
brought  
after time  
of payment  
expired.

If the declaration be against any party to the bill except the drawee or acceptor, and the bill be payable at any time *after date*, and the action not brought till the time is expired, it will be *necessary* to insert, as in declarations on promissory notes, immediately after the words denoting the time appointed for payment, the following words, viz. *which period has now elapsed*, and instead of averring that the bill was presented to the drawee for acceptance, and that he refused to accept the same, to allege that the drawee [naming him] *did not pay the said bill, although the same was there presented to him on the day when it became due.*

1st.—On  
bills paya-  
ble after  
date.

And if the declaration be against any party except the drawee or acceptor, and the bill be payable at any time *after sight*, it will be necessary to insert after the words denoting the time appointed for payment, the following words, viz. *and the said drawee [naming him] then and there saw and accepted the same, and the said period has now elapsed*, and instead of alleging that the bill was presented for acceptance and refused, to allege that the drawee [naming him] *did not pay the said bill, although the same was presented to him on the day when it became due.*

Directions  
for declara-  
tions on  
bills or  
notes pay-  
able at  
sight.

If a note or bill be payable at sight, the form of the declaration must be varied so as to suit the case, which may be easily done.

Directions  
for declara-  
tions on  
foreign  
bills.

Declarations on *foreign* bills may be drawn according to the principal of these forms, with the necessary variations.

### COMMON COUNTS (d).

1. Goods  
sold (e).

Whereas the defendant on —, at London, [or "in the county of —,"] was indebted to the plaintiff in £—, for the price and value of

(d) For most purposes as there is only one promise at the conclusion, these several allegations of common debts are deemed as only one count, and may be pleaded to as such. But the Reg. Gen. Hil. Term, 4 W. reg. 5, as to pleadings, expressly declares that as regards the prohibition against introducing several counts for the same subject-matter, each alle-

gation is to be deemed a separate count, though the count upon an account stated may always be introduced.

(e) The common quantum valebant or quantum meruit counts are no longer to be inserted, ante, 27; see the comprehensive form, post, 60, 62.

goods *then and there* bargained [or "sold,"] and sold [or "delivered"] by the plaintiff to the defendant at his request.

REG. GEN. TRIN. T. 1 W. 4.

And in £—— for the price and value of work *then and there* done, and materials for the same provided, by the plaintiff for the defendant at his request.

2. Work and materials.

And in £—— for money *then and there* lent by the plaintiff to the defendant at his request.

3. Money lent.

And in £—— for money *then and there* paid by the plaintiff for the use of the defendant at his request.

4. Money paid.

And in £—— for money *then and there* received by the defendant for the use of the plaintiff.

5. Money received.

And in £—— for money *found to be* due from the defendant to the plaintiff on account *then and there* stated between them.

6. Account stated.

And whereas the defendant afterwards, on, &c. in consideration of the premises respectively, then and there promised to pay the said several monies respectively to the plaintiff on request, Yet he hath disregarded his promises, and hath not paid *any of the said monies*; or any part thereof, to the plaintiff's damage of £——, and thereupon he brings suit, &c.

7. General promise applicable to all the counts.

8. General breach.

If the declaration contains one or more counts against the maker of a note or acceptor of a bill of exchange, it will be proper to place them *first* in the declaration, and then in the general conclusion to say, "promised to pay the said last-mentioned *several monies respectively*."

Directions how to frame declarations when there is a count on a bill or note besides the common counts.

[N. B. Conclusion of Reg. Gen. Trin. T. 1 W. 4.]

## DECLARATIONS IN ASSUMPSIT.

### PRESENT FORM OF AN INDEBITATUS COUNT.

And whereas also (a) the defendant on the day and year last (b) aforesaid (c) was indebted to the said plaintiff in £—— (d) for, &c.

COMMON COUNTS.

(a) If there be no special count preceding the indebitatus count, the form immediately after the commencement of the declaration runs thus: "For that whereas the defendant, on the \_\_\_\_ day of \_\_\_\_, in the year of our Lord \_\_\_\_, [being a day before the issuing of the writ, the date of which will appear in the issue, pursuant to Reg. Gen. Hil. T. 3 W. 4,] was indebted," &c.

common counts a day as recent as possible, with reference to the date of the writ, which should always be observed, so that the common breach may appear to be after the money payable by the bill, note, &c. became due. Care must be taken that the may be not one after the date of the writ; see ante, vol. i. chapter Declaration.

(c) The venue is now by Reg. Gen. Hil. T. 4 W. 4, to be omitted in the body of declaration or any counts thereof.

(d) If the words "lawful money of Great Britain" have not been before mentioned,

(b) If there be a special count preceding the indebitatus count, it is usual, especially in declarations on bills or notes, to insert in the

The present concise form of an *indebitatus assumpsit* count.

COMMON  
COUNTS.

[*Here the subject-matter of the debt must be stated, as that the defendant was indebted for "land," or "goods sold," or for "work done," or for "money lent," &c. as in the following counts, 2 Saund. 350, n. 2; and, except in the counts for money had and received, it must always be alleged that the debt was incurred at the defendant's request, as follows, 1 Saund. 264, n. 1:—*] and at his request. [*If there be another debt or debts the same may be here introduced as in the form prescribed, ante, §2, viz. "and in £—— for, &c."*] and being so indebted, the defendant, in consideration thereof, afterwards, on the day and year aforesaid, promised the plaintiff to pay the said last mentioned sum of money to him on request.

Conclusion  
prescribed  
by Reg.  
Gen. Trin.  
T. 1 W. 4.  
(e).

And thereupon the defendant afterwards, on the day and year aforesaid, in consideration of the premises respectively, then promised to pay the said several sums respectively to the plaintiff on request; Yet he hath disregarded his promises, and hath not paid any of the said monies or any part thereof, to the plaintiff's damage of £——, and thereupon he brings suit, &c.

*Indebitatus  
assumpsit  
on a prom-  
ise to pay  
by chattels  
(f).*

For that whereas the defendant heretofore, to wit, on, &c. was indebted to the plaintiff in divers goods and chattels, to wit, [100 fish,] of the value of £10 for divers tolls or dues, due and of right payable from the defendant to the plaintiff, for and in respect of the defendant having before then used and enjoyed, and having at his request, and by the sufferance and permission of the plaintiff, had the liberty and privilege of using and enjoying divers capstans, machines, windlasses, and ropes of the plaintiff, to haul, and assist in the hauling, on the beach and shore of divers boats of the defendant, and of divers other boats which the defendant had used, at the request of the defendant, and being so indebted, he the defendant, in consideration thereof, afterwards, to wit, on the day and year aforesaid, promised the plaintiff to pay him the said goods and chattels when he the said defendant should be thereunto afterwards requested.

Yet, &c. [*stating a breach in the non-payment of the goods and chattels.*]

here insert them, instead of the words "like lawful money." But such words are altogether immaterial, and need not be inserted, though usual to insert them in the first place where money is mentioned.

(e) See prescribed forms, ante, §8; and see the suggestions for a better form, post, 61, 62.

(f) The subject-matter of the above form is from 6 B. & C. 885, where it was held that *indebitatus assumpsit* would lie for goods and chattels. The form may be readily adapted to other claims for goods. See 6 B. & C. 884, as to the use of this count.

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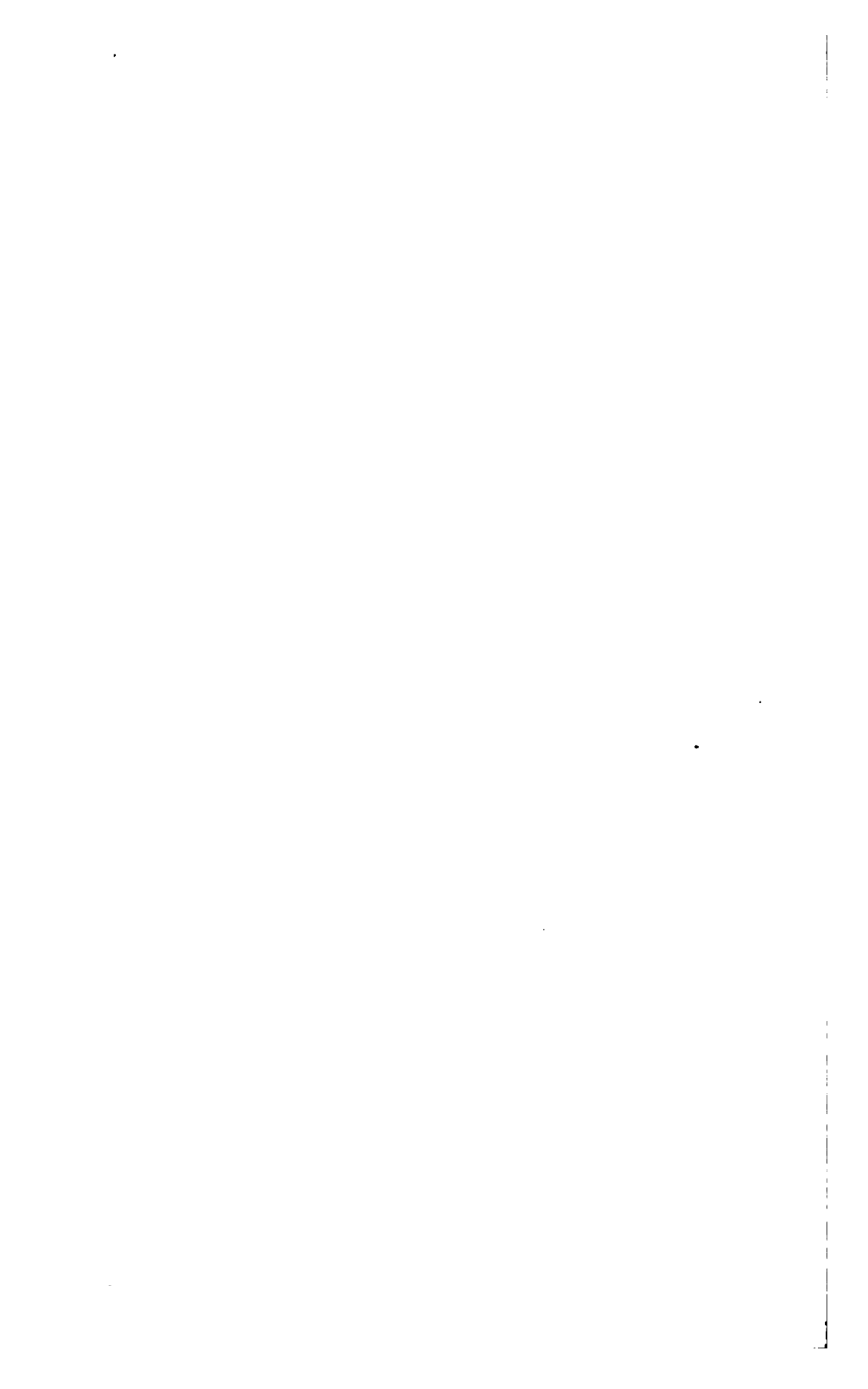
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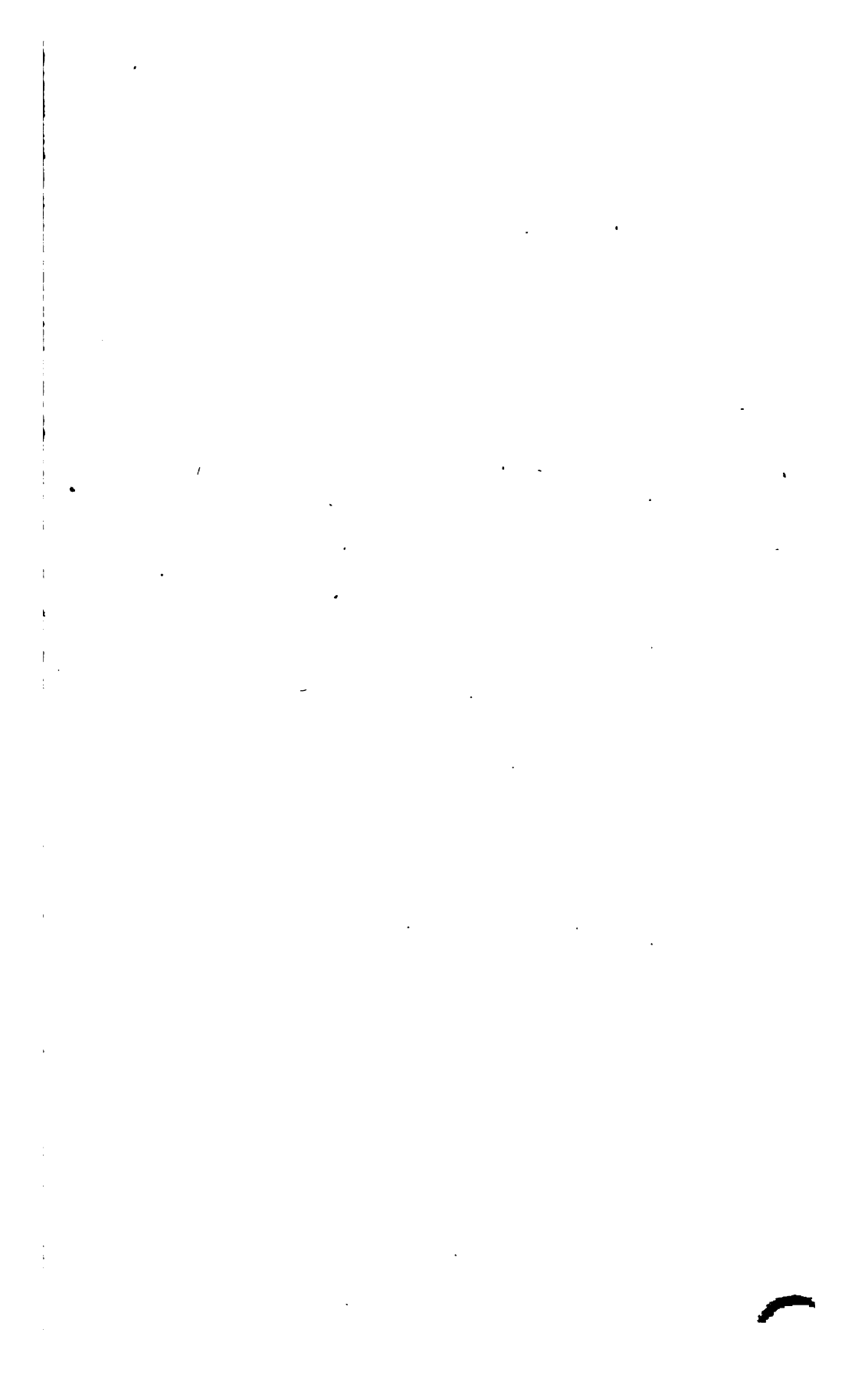
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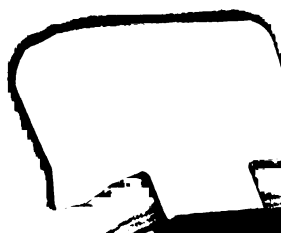
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